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No. 490

IN THE

Supreme Court of the United States

October Term, 1965

SAMUEL H. SHEPPARD,

Petitioner,

vs.

R. L. MAXWELL, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio, Eastern Division is reported at 231 F. Supp. 37 (S.D. Ohio 1964) and the opinion of the United States Court of Appeals for the Sixth Circuit is reported at 346 F. 2d 707 (6th Cir. 1965).

STATEMENT OF THE CASE

Marilyn Sheppard, petitioner's pregnant young wife, was bludgeoned to death in the bedroom of her lakeshore home during the early morning hours of July 4, 1954. Dr. Sheppard told police that he had wakened from his sleep on a couch in the downstairs living room by a noise or cry

from upstairs, ascended the stairs, and was knocked unconscious while grappling with an unidentifiable white "form" standing next to his wife's bed. He further stated that upon recovering, he pursued the form out of the house, to be again knocked out while struggling on the shore. The evidence disclosed that Dr. Sheppard had recently been unfaithful to his wife.

The United States Court of Appeals for the Sixth Circuit has set out in its opinion such a direct, concise and accurate history of the case that respondent does not feel it necessary to attempt to improve upon it. Therefore, respondent sets forth below the history of the case made by the Court of Appeals.

> "Appellant, Warden of the Ohio State Penitentiary, appeals from a United States District Court order declaring void the 1954 conviction of petitioner, Dr. Samuel H. Sheppard. Judgment had been entered in the Court of Common Pleas of Cuyahoga County, Ohio, upon a jury verdict convicting Sheppard of the second-degree murder of his wife. Upon his appraisal of trial and pretrial publicity and other matters, the District Judge concluded that Dr. Sheppard did not have a fair trial and was thus deprived of rights guaranteed him by the United States Constitution. His order granted bail to Dr. Sheppard and released him from the Ohio Penitentiary where he had been confined under a life sentence since his conviction in 1954. Ohio was granted 60 days within which to take further action against Dr. Sheppard. *Sheppard v. Maxwell*, 231 F. Supp. 37 (July 15, 1964). This Court has stayed the order fixing such time limitation.
>
> "Sheppard's conviction and the denial of his motion for new trial on grounds of newly discovered evidence were both affirmed on appeal by the Court of Appeals for Cuyahoga County, Ohio. *State v. Sheppard*, 100 Ohio App. 345, 128 NE (2) 471 (1955); *State v. Sheppard*, 100 Ohio App. 399, 128 NE (2) 504 (1955). The Ohio Supreme Court dismissed an appeal from the decision affirming the denial of a new trial

in *State v. Sheppard*, 164 Ohio St. 428, 131 NE (2) 837 (1956), and affirmed the conviction in State v. *Sheppard*, 165 Ohio St. 293, 135 NE (2) 340 (1956), two judges dissenting. Application for certiorari was denied by the United States Supreme Court, *Shepard v. Ohio*, 352 U.S. 910, 1 L. Ed. (2) 119 (1956), and rehearing was denied, *Sheppard v. Ohio*, 352 U.S. 955, 1. L. Ed. (2) 245 (1956). Dr. Sheppard's later petition to the Supreme Court of Ohio for a Writ of habeas corpus was denied, *State, ex rel. Sheppard v. Alvis*, 170 Ohio St., 551, 167 NE (2) 94 (1960). Dr. Sheppard thus has had the benefit of all the processes of law provided by the State of Ohio, and the United States Supreme Court did not see fit to take the case for its review.

"The habeas corpus proceeding here involved was commenced in the United States District Court April 11, 1963, charging, as amended, some 23 separate constitutional defects in Sheppard's conviction. Some of these had already been found without merit by the Ohio Courts and others were new. Indicating his view that there were probably other constitutional imperfections in Dr. Sheppard's trial, the District Judge bottomed his decision on four separate grounds, (1) newspaper publicity before and during the trial denied Sheppard a fair trial, (2) the trial judge should have disqualified himself, (3) evidence that Sheppard had refused to take a lie detector test and that another witness had taken such a test was improperly brought before the jury, and (4) the bailiffs in charge of the jury after the cause was submitted to it improperly allowed individual jurors to make telephone calls to their families. Grounds 1 and 4 were passed upon in the Ohio Court of Appeals and Supreme Court and were found to be without merit. They were also relied upon in the application to the United States Supreme Court for certiorari, which was supported by the same volumes of newspaper publicity as are before us. Ground 2 and part of ground 3 were first asserted in the instant petition for habeas corpus." (Rs. 1-3)

The United States Court of Appeals for the Sixth Circuit felt that the release of petitioner was improvident because the District Court's findings were clearly erroneous and because petitioner had failed to sustain his burden of proof and therefore vacated the order of the District Court and remanded petitioner to the custody of the respondent Warden of the Ohio Penitentiary, Columbus, Ohio, on May 5, 1965. Petitioner filed a motion for rehearing *en banc* on June 11, 1965 and a petition for rehearing on the same day. Both the motion for rehearing *en banc* and the petition for rehearing were denied on July 14, 1965 with one judge dissenting. (Rs. 111-113) On July 26, 1965, the Court of Appeals entered an order staying the mandate and petitioner's petition for writ of certiorari was filed herein on August 24, 1965. The writ of certiorari was granted on November 15, 1965. A motion to dispense with the printing of the record was granted on December 13, 1965.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues in this case present fundamental questions concerning an accused's right under the due process clause of the Fourteenth Amendment to a trial by a jury composed of fair and impartial jurors in a court room presided over by an equally fair and impartial judge. Basically, the issues presented here may be reduced to two in number. The first concerns the effect of the newspaper publicity upon those above enumerated rights of accused. The second issue relates to the method and standards by which the effect of the newspaper publicity may be deemed to have denied to an accused his right to a fair trial.

There is no question that this case does not present a situation in which actual judge and juror prejudice has been shown to exist. We are here concerned with the question of under what circumstances newspaper publicity may be deemed inherently prejudicial to the accused without a showing by him of any identifiable prejudice and without a showing that the prejudice fatally infected the actual trial.

The District Court in essence found from the volume and nature of the publicity involved such a manifestation of community prejudice against the petitioner that no fair and impartial jury could have been seated at the time and that it was, therefore, a denial of petitioner's constitutional rights to refuse his motions for change of venue and continuances. Respondent maintains first of all that, while extensive and sensational, the newspaper publicity was not so unequivocal as to warrant a finding of pervasive prejudice inherent in its nature. Respondent urges that the determination of the prejudicial or the non-prejudicial nature of the newspaper publicity must be determined from the whole by a searching and detailed analysis

thereof. While not denying that there may be times when a court could reasonably infer from the existence of pre-trial publicity alone, without proceeding to examine voir dire record, the existence of pervasive community prejudice such should only be done when the unequivocal nature is such that the probable effect would be that no reasonable man possessed of the attributes we normally accord to jurors could help but form a fixed opinion of the guilt of the accused. The inquiry in any highly publicized trial should address itself to the probable effect of this newspaper publicity on the jurors who actually sit at the trial of the accused. Absent evidence of obvious community prejudice, the voir dire record continues to afford the best source of evidence relating to juror prejudice or impartiality as well as evidence of some nexus between community prejudice and the trial.

Petitioner has not presented any evidence of community or juror prejudice and the nature and quality of the publicity attendant upon his trial while sensational was not of a character calculated to create fixed and lasting opinions either as to his guilt or innocence. The voir dire record not only indicates a lack of jurors' prejudice but is evidence of a degree of fairness far beyond requirements of constitutional due process. In the light of these considerations petitioner has failed to show in what way he was denied the right to a fair and impartial trial.

Publicity during the trial and alleged prejudicial communications with the jurors have not been shown to have come in contact with the jury; neither are they of such a nature as to be classified as inherently prejudicial.

Other claims of due process deprivation are similarly unfounded in fact and unjustified in assumption. This

case represents but an extreme example of an attempt to establish as fact a constitutionally infirm trial solely on the basis of unwarranted and unjustified presumptions devoid of any evidentiary support. Respondent, therefore, contends that petitioner has failed to sustain his burden of proof and for that reason the decision of the United States Court of Appeals for the Sixth Circuit should be sustained.

ARGUMENT

I. The Sufficiency of the Evidence

By way of introduction, Respondent directs the Court's attention to question number 10 of Petitioner's "QUESTIONS PRESENTED", to-wit: "10. Did the court below improperly foreclose without litigation the question of the sufficiency of the evidence?"

Respondent urges that Petitioner has totally and summarily misstated to the Court that there was not sufficient evidence presented at Petitioner's trial. At page 14 of Petitioner's brief he stated: "There was presented at Dr. Sheppard's trial no sufficient evidence to sustain a conviction, . . .". And at page 61 of his brief states further that:

> "All that was ever proved at trial was that Marilyn Sheppard had been murdered by someone. Any reasonable and objective view of the total circumstances of the case compels the conclusion—reached by Judge Kingsley A. Taft, dissenting in the Ohio Supreme Court (Ra 119a)—that Dr. Sheppard did not kill his wife."

This is just another example of petitioner's attempt to constantly mislead this court.[1] It is apparent that petitioner

1. (Respondent wishes to emphasize before proceeding further that Judge Taft did not say "that Dr. Sheppard did not kill his wife." What Judge Taft did say is that "the state established by its evidence facts and circumstances which cannot be *reconciled* with any *reasonable hypothesis* except that of defendant's innocence." Immediately following that statement Judge Taft pointed out by way of illustration that the only blood found on petitioner's pants was limited to the area around his knee where it supposedly touched the bed when he checked his wife's pulse. Judge Taft concluded that had Sheppard been the murderer, the evidence indicated "without contradiction" that defendant's wife's blood had spirted all over the room and that defendant would therefore have been covered by more blood than was found on him. What Judge Taft failed to consider is the fact that by Sheppard's own story he had laid for almost two hours in the water of Lake Erie. Consequently the absence of blood on Sheppard's clothes *is* reconciled with other evidentially supported hypothesis other than of defendant's innocence. Furthermore, the majority of the Supreme Court of Ohio obviously did not agree.) Ra 119a

attempts to make a constitutional issue out of the sufficiency of the evidence. Thus, respondent urges that a review of the entire trial transcript is necessary to show that this assertion is totally lacking in substance and that petitioner's conviction is not "so totally devoid of evidentiary support" as to constitute a denial of due process. *Garner v. Louisiana, Thompson v. City of Louisville, Hall v. Crouse.* Petitioner's further claim that the Court of Appeals improperly denied him a fair review of this case is, of course, without foundation. Although the District Court did not find it necessary to reach the question of the sufficiency of the evidence, the Court of Appeals did consider the issue and found it to be without merit.

Petitioner has consistently tried to impress on all concerned the innocence of Sam Sheppard and the erroneous assertion that there did not exist legally sufficient evidence to convict. These assertions have implicitly tried to insinuate that Sheppard's conviction was brought about *not* by evidence at trial but by "evidence" in newspapers and only the newspapers, with the effect that *newspaper publicity took the place of a fair trial.* Petitioner would lead this Court to believe that Sheppard was convicted by minimum of evidence which, apparently in his opinion, amounted to nothing, and that he was convicted only as a result of outside publicity and influences, when in fact over the weeks of trial there was expertly presented to the jurors some 31 witnesses for the State of Ohio, 39 witnesses for Petitioner, 96 exhibits offered into evidence by the State, and 175 exhibits offered into evidence by Petitioner. Further, it should not be overlooked that the State's case was presented by three experienced and able assistant county prosecutor's and that the defense was ably conducted by three fully

experienced defense attorneys; the chief defense attorney, Mr. Corrigan, being known as one of the foremost criminal attorneys of the area, all of which can lead to but one conclusion, that this was not such a trial which could justifiably be termed a "mockery of justice", as has been done, but was an expertly handled proceeding with all possible facts being presented to the jury with the end result that Sheppard was found guilty beyond any reasonable doubt, which end result could be, and was rendered by twelve unbiased and unprejudiced jurors.

Respondent will argue the sufficiency of the evidence first, in this brief, to dispel any suspicion that Sheppard was unjustifiably convicted and to demonstrate to the Court that the evidence is an integral part of the background circumstances *against* which the *effect* of publicity must be viewed. Respondent urges the Court that to fully understand *all issues presented* it is necessary to fully read and follow the evidence as it was presented to the jury. To fully grasp this entire situation one must read the whole trial transcript. It can then be seen the evidence legally unfolded and proved that this murder was perpetrated by Sheppard and that his *changed* stories were shown to be at least figments of his imagination.

To assist the Court Respondent's argument on the question of sufficiency of evidence has been divided into four major catagories:

(I) A summary compilation of all statements related by Sheppard prior to commencement of the trial. The statements will be numbered 1 through 8 in order of time given and not in the order as presented to the jury.

(II) A summary compilation of the evidence adduced from the State's witnesses. Each witness generally summarized in the order of appearance, with the exception that Sheppard's statements are not repeated.

(III) Summary of the Defense.

(IV) Conclusion.

(I) STATEMENTS BY SHEPPARD

Statement 1[2]

The first words spoken by Sheppard after the murder were to Bay Village Mayor Houk at slightly before 6:00 A.M., July 4, 1954, the mayor testifying that he received the phone call from Sheppard who announced:

"Come quick, Spen, I think *they* have killed Marilyn."

Thus, we see that the so-called burglar had a companion.

Statement 2[3]

One of the first known accounts of the murder that was presented to the jury was made to Marilyn's father at the hospital. In this account when Sheppard was asked what happened answered:

"They killed Marilyn."

As to whether they were white or negro, he stated he could not tell. Sheppard described the happenings as, that he heard Marilyn screaming; that he had gone upstairs, and when he *reached the top of the stairs* he was knocked out. When he came to, he heard noises, and he said he chased *them*. He said he tried to tackle *them*. Finally, he got to the beach and was knocked out a second time.

The next time Sheppard stated his story, as related to the jury, was in the family hospital where he had been hurridly taken by brother Stephen, both leaving Sheppard's house at approximately 6:10 A.M., July 4th. There were two statements related to two Cleveland, Ohio, homicide detectives who had been called into the case by authority of Mayor Houk shortly after 6:00 A.M., July 4th. The *first visit* by the two officers was in the morning hours and the second during the afternoon; however, between the two visits there had been found in the bushes on the Sheppard

2. Prosecution Witness, TR 2248-2366
3. Prosecution Witness, Tr 4805-4815

property a green cloth bag being about twelve inches long, and containing, what was later identified as Sheppard's property, his wrist watch, ring, key chain and keys. Sheppard was asked if he had ever seen the gren bag before, he stated that it was the bag in which he kept his motor boat tools, the bag containing the tools having been kept in a drawer in the desk of his study.

Statements 3 and 4 [4]

At the first visit, Sheppard related the events of the evening prior; that he had fallen asleep on the day bed in the living room, that he was awakened by what he thought to be his wife *calling*. After being awakened he proceeded up the stairs in the *darkness*, passing the light switch, and as he reached the top of the stairs, he saw a "*white form*" to the rear of or beside his wife's bed. He said he had *contact* with the "intruder", that he *did not know* whether he struggled in the *bedroom* or not, that he felt he was struck from behind . . . and he said he felt it was more of a *Judo punch*. Sheppard went on to relate that when he came to he got into a sitting position, and by the glimmer of a lamp in the dressing room occupied the night before by a friend, Dr. Hoversten, he saw the outline of his badge, which was in his wallet, on the floor, thus, he *picked the wallet up* and placed it in his pocket. He further went on to say that he heard a noise downstairs, proceeded down the steps (again without turning on lights) and saw this form going out the Lake Front door so he took chase. The chase continued down some 57 steps which led to the lake dock, at which point Sheppard stated he *grappled* with the form on the beach and was again rendered unconscious.

There Sheppard lay with, he thinks, feet toward the water and head toward the cliff or lakes edge. It is noted

4. Prosecution Witness, Tr 3550-3766; Prosecution Witness, Tr 4085-4107

that Sheppard had to lay in the water with the waves lashing over him, as he stated, from shortly after the established time of death, between 3:00 and 4:00 A.M., to just prior to the phone call to Mayor Houk, which was slightly before 6:00 A.M.

During the above two referred to conversations on July 4th, the police officers asked various questions, such as, was there one or two men, the answer being *he did not know.* He was asked if he could identify the intruder, and all he could recall was that it was a "*white form*"; asked why, if his wallet was out, did not this person take the $63.00 in cash and the $1,000 check made payable to him . . . *he could not answer.* Sheppard was asked what happened to his T-shirt (which was missing and never found) and he *did not know* what happened to it. Asked during the second visit why the bag with the contents was found where it was, noting that Sheppard did not mention his personal property being missing during the first visit, he related he *did not know, BUT* he stated, someone must have taken the jewelry from him at the time he was unconscious upstairs. Sheppard was asked if he could identify any individual and *he could not*—asked if the person he grappled with on the beach was the same person that he had contact with in Marilyn's room, he stated *he did not know.* Sheppard was further asked to describe the form he struggled with down on the beach and all he could recall *was that he appeared larger than he was, with bushy hair, and in dark clothing.*

The evidence clearly showed to the jury that the wrist watch belonging to Sheppard that had been found in the green bag had very identifiable blood on the band and watch and that there was water on the inside of the crystal. One of the Cleveland police officers' testimony informed the jury that Sheppard gave three different versions as to how the water got under the crystal. First he stated he attended

stock car races two or three days previously and was caught in a drenching rain. Second he related that he inadvertently water-skied with the watch on and third, that on Friday before the murder he was helping his brother with their boat in the lake and brother Stephen shouted to him that his watch was getting wet.

Further, when Sheppard was asked to explain how the *blood* got on his watch he claimed he took his wife's pulse at the neck on *his last visit to the murder room* (just prior to calling Mayor Houk); however, by his own account the watch was gone by this time, since he already stated to the officer that the burglar must have taken the watch when he was unconscious.

Sheppard was asked why he did not flip on the upstairs light when he heard his wife scream and dashed upstairs. He said he did not know why he didn't since the switch was handy and *would not have slowed him down.* (note also, as stated above, he did not flip it on when he dashed downstairs either). A similar type of answer was given when asked why he did not use the telephone which was directly beside Marilyn's bed, noting that Sheppard stated that after his return from the lake he proceeded to examine his wife *again* and after doing so went downstairs to use the phone.

Also, during the July 4th conversations, the officers told Sheppard they had heard that he had been keeping company with a nurse from Bay View (family) hospital, that the nurse had quit and she was now in California, and that while he was in Los Angeles several months ago (March, 1954) and his wife was staying somewhere else (in northern California with friends), he was seeing this nurse. Sheppard stated,"*that is not true.*" Further, it was hinted by Sheppard at this time that his wife, Marilyn, had several

potential lovers and one of these could have murdered his wife in a maniacal act of compulsion.

There was testimony in evidence to show that the authorities after July 4th were unable to talk with Sheppard until July 8th. During this time interval there were numerous contacts made to the Sheppard family and Sheppard's attorneys requesting an interview, the answers usually received ran along the lines of . . . he is under sedation . . . he is . . . and then refer to the injuries that Sheppard claimed he received during his "grappling" with the "intruder."

Finally, on July 8th the County Coroner, Dr. Gerber, and three police officers met at the Sheppard family hospital where Sheppard was being held incognito, at least for the time, and there they conversed with the brothers and father of Sheppard and his attorney, Mr. Corrigan. There was much discussion and finally the Coroner wrote out a subpoena and ordered it served on Sheppard. When the service was about to be accomplished Mr. Corrigan stated one specific police officer could talk with Sheppard.

Statement 5 [5]

The officer testified that the interview was extremely unsatisfactory because during same brother Richard would enter and talk, then brother Stephen would come in and interrupt, and finally father Richard Sr., entered and stated that that was enough, to call it a day as Sheppard was weak now.

However, the officer testified that the substance of the interview was:

> "He was asked to explain what he knew of what happened in his home from the time when he left the Ahern's residence and they had dinner together . . that he became tired and laid down on the couch in the

5. Prosecution Witness, Tr 3824-3921

living room. That he remembered *being awakened* but he did not know the time. He thought that perhaps his wife might have awakened him but he fell asleep again on the couch, and then some period of time after that he thought he heard his *wife scream* and *mention his name, 'Sam.'* (Respondent's note: considering all the statements to this point this is the first time Marilyn is supposed to have called Sheppard's name.) He ran up the stairs and when he reached the top of the *stairs he looked into his wife's bedroom.* That he observed some form *stooping over his wife's bed,* and as he was about to *enter he was suddenly struck from behind,* then fell to the floor."

The officer responded to a further question:

"I asked him if he could give me a meager, if not a good description of the intruder he saw stooping over the bed. His reply was that *it was taller than he, had a white top,* and *he thought he had bushy hair.* I asked him if he thought that was the same one that he saw going through the front door, he said he *didn't know.* I asked him about whether or not he had made any enemies during the time he had been out there, if he knew someone that may have had a reason to destroy him or some member of his family over his profession. He said he didn't know of that time but he might have had three or four. That his wife may have had some admirers. I asked him about how many. He said probably three or four. I asked him if he ever talked to these admirers, if he ever objected to it. He said no, he was rather impressed with the fact that his wife did have a lot of admirers. He said he knew of no reason why anyone would take his life."

After an entire reading of the trial transcript there is not one iota of evidence to show that Marilyn had any admirers, with the exception of Sheppard's testimony, in fact, the evidence tended to show exactly the opposite, namely, to the effect that she was a good wife and mother and that she was of the highest caliber and character.

Statement 6 [6]

On July 10, 1954, there was a written signed statement taken from Sheppard . . . being given in the presence of police officers and Sheppard's attorney. This statement was submitted in its entirety to the jury and there were some very noted additions and changes when compared with Sheppard's prior admissions and statements.

At the outset of this statement there was a somewhat rambling resume of the evening before the murder wherein it was described how the Sheppard and their friends the Aherns met and had dinner along with the total of three children. Sheppard mentioned how they had a few drinks, then later dinner was prepared and they ate on the lake side porch . . . mentioning how it was "*quite breezy*", the wind coming from the north generally, and that jackets and sweaters were necessary. He mentioned it was then he placed his brown corduroy jacket on. (the same jacket found folded and undisturbed on the end of the bed which he later went to sleep on.)

Sheppard went on to say that the television was on and they watched a movie, as well as listening to a baseball game on the radio. Further, as to the evening before, he remembers dozing off to sleep and then that, "my wife partially awoke me in some manner and I think she notified me that *she was going to bed.*" The next he recalled was that he thought that Marilyn *cried or screamed out.*

> "that he *thought* she 'cried or screamed my name once or twice,' at which time he ran upstairs. Sheppard continued . . . "I *charged into our room* and saw a form with a light garment, I believe. At that time—at the same time—*grappling with something or someone.* During this short period I could hear loud moans or groaning sounds and noises. I was struck down. It seemed that I was hit from behind somehow but had grappled this individual from in front or generally in

6. Prosecution Witness, Tr 3550-3766 (typed transcript page numbers 2013-2038)

front of me. I was apparently knocked out. The next thing I knew I was gathering my senses while coming to a sitting position *next to the bed, my feet toward the* hallway."

Continuing: . . .

"In the dim light I began to come to my senses and recognized a slight reflection on a badge that I have on my wallet. . . . I looked at my wife, I *believe* I took her pulse and *felt* that she was gone."

Sheppard then relates how he *believes* he ran into his son's room and then heard a noise downstairs and ran down. Note that there was no mention of even an attempt to make a phone call from the phone not more than three feet away and not turning on any lights.

Sheppard then recited, after running downstairs that:

"I then saw a '*form*' progressing rapidly somewhere between the front door toward the lake and the screen door, or possibly slightly beyond the screen door. I pursued this form through the front door, over the porch and out the screen door. All of the doors were *evidently* open, down the steps to the beach house landing and then on down the steps to the beach, where I *lunged* or *jumped* and grasped him in some manner from the back, either body or leg, it was something solid. *However, I am not sure.* This was beyond the steps an *unknown* distance but probably about ten feet. I had the feeling of twisting or choking and this terminated my conciousness."

Sheppard described how he awoke at the water's edge,

"on my face, being wallowed back and forth by the waves,"

and how he regained his senses and went to the house where:

"I went back upstairs and looked at my wife and *felt her* and *checked her pulse on her neck* and *determined* or *thought* that she was gone.".

He then went back downstairs and called Mayor Houk, and just prior to or just after their arrival (6:00 A.M.) is the first he noticed any alleged injury to himself, stating,

> "The injury to my neck is the only severe pain that I can recall. *I should say, the discomfort in my neck*".

He then describes the short time period from the arrival of the Houks to the time when brother Stephen rushed him to the car and drove 60-70 miles per hour to the family hospital (the time period being some 10 minutes). It is interesting to note that with three doctors present and being so obvious that Marilyn was dead that no one suggested to use the awaiting ambulance, if Sheppard actually did have injuries.

It was read to the jury Sheppard's version of the interviews by authorities and the showing of the articles from the mentioned green bag . . . also the relation of how the water got under the crystal (the three stories). Sheppard went on about his courtship of Marilyn and the first few years of their marriage . . . at which time he seemed to be implying that Marilyn had at first been "quite jealous" of his work and the fact that his work required him to come in contact "with many women, both patients and fellow workers". Then there were specific questions asked regarding Marilyn having accused him in the past of affairs with other women, and Sheppard answered,

> "She indirectly may have in questioning me about my whereabouts at various times . . .".

There were direct questions and answers related to the jury as to Sheppard's affairs with Miss Susan Hayes, which showed that she had been employed at the family hospital and that he would not call it an affair that he had had with her but,

> "*we have been good friends for some time*".

When asked if he socialized a lot with her he answered,

> "In the hospital, yes. I wouldn't call it socialized. We talked, we became *good friends* . . . Q. Nothing more than good friends? . . . A. No.".

Sheppard admitted that when he was in Los Angeles in March of 1954 he did purchase her (Susan Hayes) a new wrist watch because she had lost hers.

There were further questions as to another lady who was married to the salesman that sold Sheppard his Jaguar Sport car. Sheppard answered that he had become "very well acquainted with her" but *denied that it developed into a love affair*; however, he did admit that after a marital discussion with Marilyn, himself, the salesman and his wife, that he and Marilyn decided that it would be best not to socialize with them any longer. Finally Sheppard stated that he knew that Marilyn had been informed of the "rumor" concerning this lady and himself and he agreed that the social contacts should be minimized.

Sheppard was asked if he knew of any reason why someone would want to murder his wife he answered,

> "Well, I don't know but I have heard of individuals who are maniacal enough that when they start something, an act like that, it becomes a compulsion, a means of satisfaction like the ordinary man has from an orgasm or something of that nature. She has spurned lovers, potential lovers. Q. How many of those potential lovers did she have? A. Three that I know of and I am pretty sure, more. I am certain that there were more."

(Note: if there were any such so called spurned lovers there was absolutely no showing of such to the jury).

Upon further questions regarding the *entering of the murdered woman's bedroom* it is clear at this time that *Sheppard is claiming to have entered the room and grappled with someone* . . .

"I don't recall seeing anything from the head of the stairs, it happened so rapidly, it must have been when I entered the room and I don't know whether they were standing or stooping",

and later he answered to another question,

"Because as I told you, I seemed to be immediately engaged in grappling with someone." and "I don't recall holding any portion of the body in the bedroom.".

Finally, when asked the condition of the beach and lake when he chased the form down the steps, Sheppard described the beach as "firm, as though it had been washed over and packed somewhat". As to the condition of the lake he stated that it was somewhat windy and,

"The waves were moderately high, I'll say too high to water ski and not too high to fish, not real high but moderately high".

Statement 7[7]

(Sworn Testimony at Coroner's Inquest)

The next time Sheppard spoke out was at the Coroner's Inquest held July 18, the statements of Sheppard being related to the jury by Coroner Gerber. When Sheppard was asked to describe this murderous burglar he said that he rushed after this form and that he could not tell definitely what this form was, that he *could not tell* whether it was a,

"human being or whether it was a man or woman, whether or not it had a hat on, whether or not he could see any hair, whether or not it had a coat or trousers on".

Sheppard further testified at the inquest that when he came into the bedroom the *last* time he took Marilyn's pulse at the neck (Sheppard wears his watch on his left hand). It should be mentioned that there was evidence at the trial

7. Prosecution Witness, Tr 2956-3549

that Sheppard's trousers had blood on the knee and that prior to the inquest he had told police that the spot on the knee and the blood on his wrist watch must have gotten on at the time he took Marilyn's pulse during his last visit to the bedroom.

Sheppard was asked about his dog (testimony before the jury that the Sheppard house dog never barked), about his brown corduroy coat (the coat having been found neatly folded at the end of the day bed on which Sheppard was sleeping) and about the T-shirt which he had been wearing and was missing . . . his response to all questions being *that he could not remember anything at all about these items.*

Sheppard was quizzed as to whether there were any difficulties in his marital life and at another point whether or not there had been any *question of divorce* between him and his wife and he answered *"NO"* to both.

In response to questioning concerning a young lady living in California by the name of Susan Hayes he stated he knew her and when asked if on his recent trip to Los Angeles he *did or did not live in the same bedroom with her* at a doctor friend's house, he answered *"NO"*.

Statement 8 [8]

A final interview was given to authorities on July 31, 1954, when he was asked about Susan Hayes and he said that *he had lied about her*, and that he did stay with her at a doctor friend's house in Los Angeles. He stated that he had told his wife about Susan Hayes before somebody else would tell her. He was asked about other affairs, if he told his wife about,

> "other *affairs* he was having with women, he said, yes, he always told her about that. We asked him why. He said because he didn't want her to get the wrong

8. Prosecution Witness, Tr 3550-3766

impression in case somebody else told her about those *affairs.*".

This concludes the resume of the State's evidence relating to Sheppard's statements prior to trial, thus, by way of summary what had the jury heard without considering any other portion of the balance of the State's case. They saw that at first there was more than one intruder which later merged into one . . . that while asleep he was awakened by his wife's screams, later changed to calling his name and finally cried and screamed and called his name once or twice.

As to the intruder, at first it was just a "white form", later being seen to have white from the waist up and still later termed to have on light garments. The form that he chased out of the house had dark clothes on yet he stated that he could not tell if the form was human or not, man or woman, had a hat on, coat or trousers and could not describe "its" hair; however, he later stated the form was taller than he, had a white top on and had bushy hair, the bushy hair description also fitting the person with whom he grappled on the beach.

He has told the jury first that when he arrived at the top of the stairs he was knocked unconscious by a judo blow from the rear, then it changed that he was suddenly struck from behind as he entered the bedroom. Later he struggled and grappled in the bedroom where he was then struck from the rear and fell to the bedroom floor next to the bed . . . yet prior to the last statement Sheppard said he did not know if he struggled in the room or not.

Concluding further from all statements the jury heard, Sheppard was awakened by some cry but not sure if cries, the call of names or what; that he ran upstairs in darkness and was hit, but knows not when as he does not obviously remember if he struggled or not, if he was rendered un-

conscious on the hall floor or bedroom floor, or how long he was there. He is also not sure if he examined Marilyn after he awoke at this point, and whether he did or didn't check his unawakened son.

The jury could quickly conclude that there is no answer to what was in the room . . . as many times as this changed Sheppard could have been struggling with a "yellow ape", if there was a struggle, which certainly could not be concluded from Sheppard's descriptions.

Sheppard says he heard noises downstairs, but called no one from the bedroom phone . . . so he ran down again in darkness and chased something or someone maybe from the front room out the door and across the porch and down the steps or maybe just across the porch and down the steps or maybe just down the steps . . . he is not sure. Also, the outside door and screen door might have been standing open or again they might have been shut . . . you could not conclude.

Then there is the beach incident . . . This "thing" might have been the form that was in the bedroom but then again Sheppard could not say. Possibly he had bushy hair, yet if it was the same form sometimes it had bushy hair and other times he could not see its hair. On the beach it could have had dark attire on . . . or maybe dark or white.

On the way to the beach Sheppard possibly tried to tackle the object, or something . . . he was not sure. He thinks he grappled with it, well, anyway he said he was rendered unconscious.

There are other observations, Sheppard lay face down on a practically non-existent beach with the waves lashing over him and wallowing him around for possibly two hours and did not regain consciousness and did not drown. Also the family pet did not bark through the entire episode nor did the Sheppards' son awaken until the next morning. The

jury is to believe that the watch he wore was stolen by the burglar during the time that he was first knocked out in the bedroom, yet, by his own statements he felt the pulse of Marilyn the second time he went into her room, which explained how the blood got on the watch, and proceeded to touch her neck . . . the watch had to be gone. The jury is also to believe that Sheppard on three different occasions, days prior to the murder, soaked his watch and then walked around for some lengthy period of time with water under the crystal . . . when the logical conclusion is that when Sheppard entered the water to clean himself off he soaked the watch.

The jury is expected to believe that this "intruder" literally beat Marilyn 35 times, then grappled or struggled with Sheppard and never used the lethal weapon on him, which the intruder allegedly had to carry with him as it was never located.

The panel was to believe that Sheppard was a dutiful and faithful husband . . . yet by his own words he lied under oath regarding affairs he had had with other women.

(II) EVIDENCE ADDUCED FROM STATE'S WITNESSES

The State of Ohio started the presentation of the case with a showing that murder had been committed and what the cause of death was. Dr. Lester Adelson [9] of the County Coroner's office testified as to the viciousnes of the attacker when he showed pictures and described the some 35 mortal head injuries. He testified that there was no evidence of sperm in or around the body of Marilyn Sheppard. One other evidentiary matter testified to by Dr. Adelson pertained to two chips of teeth found under the body of Marilyn . . . testimony being unrefuted that the chips came from

9. Prosecution Witness, Tr 1675-2015

teeth of hers and pictures were exhibited to show how the chips fit into the broken teeth.

The prosecution proceeded, after the crime of murder had been established, to relate to the jury the events of the evening before, July 3rd, when the Don Ahern's were over for dinner. Mr. Ahern[10] testified as to how the Sheppards were at his house before going to Sheppards for dinner . . . as to the drinks they had . . . that Sheppard left for a short while to go to the hospital. Testimony was offered that Mr. Ahern and Sheppard took a walk near the lake and there was discussion as to how rough it was with the waves, every second or third one, covering the entire narrow beach and hitting the cliff like wall. After dinner the three children were put to bed in their respective homes (Aherns having two children) and the adults then proceeded to watch the television movie, Sheppard also listening to portions of a baseball game on radio. Testimony indicated that Sheppard reclined on the day bed wearing his cord trousers, white T-shirt, brown corduroy jacket and shoes, where he went to sleep. The last time the Ahern's saw Sheppard that evening and Marilyn alive, was at the conclusion of the movie between 12 mid-night and 12:30 A.M., when they bid Marilyn good-night and left . . . Sheppard not being wakened by their departure.

Nancy Ahern[11] testified, in addition to the events of the evening of July 3rd., that she had had conversations with Marilyn regarding the Sheppard's domestic problems sometime in April, 1954, after the Sheppard's return from their trip to California. Marilyn mentioned the Susan Hayes girl and that she found out Sheppard had purchased her a wrist watch, having discovered this fact by seeing an expense check Sheppard had signed. It is interesting to note that

10. Prosecution Witness, Tr 2016-2127
11. Prosecution Witness, Tr 2128-2247

Sheppard testified that *he voluntarily* told Marilyn about the affairs with Miss Hayes . . . apparently, as he stated it, "because he didn't want her to get the wrong impression in case somebody else told her about those affairs". Nancy Ahern replied to direct questioning by defense attorney, Mr. Corrigan, as to her impressions concerning the love between the Sheppards,

> "Mrs. Sheppard . . . seemed . . . very much . . . in love. I was never quite sure about Dr. Sheppard".

Mayor J. Spencer Houk[12] was the first known person to receive word that Marilyn had been murdered when he answered his home phone shortly before 6 A.M. July 4th . . . the spoken words being,

> "Come quick, Spen, I think they have killed Marilyn".

Mayor Houk testified that he and his wife immediately proceeded to Sheppard's house, had a few words with Sheppard, looked at Marilyn and then called the police and brothers Stephen and Richard. After the arrival of Bay Village police Chief Eaton, he and Mayor Houk performed certain inspections around the house and along the beach and both concluded that the case was too big for them to handle. Thus, the Mayor authorized Chief Eaton to call the Cleveland authorities for assistance, which was done. Sheppard's friend, Mayor Houk, continued by telling the jury that Sheppard had come to his office where the two had a conversation in which the Mayor suggested to Sheppard that if he (Sheppard) had done this (murder) that it would be best to come out and admit it, that everyone would still stand behind him. Sheppard replied that he had not done it and reminded the Mayor that he was a suspect himself . . . the Mayor responding that this did not surprise him

12. Prosecution Witness, Tr 2248-2366

since he had previously learned that Sheppard was the one who had mentioned his name.

Following Mayor Houk to the stand was his wife Esther.[13] She testified she had gone to bed at about 3 A.M. July 4th. (Houks live just a short distance from the Sheppards) and then she related the events as they occured after their arrival at the Sheppard house as follows: When they arrived Sheppard was slumped in a den chair with no shirt on, he had cord trousers on, and noting that there was a large spot of blood on one knee. She further testified that she offered Sheppard a drink of whiskey which he refused stating:

"I can't think clearly now, and I have to think", when this offer was made she touched his shoulders and they were dry. Mrs. Houk described the Sheppard's dog as being in the house when they arrived and either went out when they came in or when the door was opened later to let someone in. Mrs. Houk related a conversation she had been involved in with her mother and Sheppard, the conversation being over possible injuries her mother had received in an automobile accident. Sheppard said in response to questioning during this conversation that a head injury was easy to pretend even though there was none there and as a doctor he knew that this could not be traced. When questioned about any known disagreements between Sheppard and Marilyn, Mrs. Houk stated that they disagreed on quite a lot of things, quite often over the cars that Sheppard continualy purchased, particularly over an MG that he brought home and that she did not like the Lincoln Continental. Also Marilyn wanted to buy more furniture and apparently had been unsuccessful. She testified that one time when Shepard was in Boston, Marilyn purchased a dishwasher which greatly displeased Sheppard upon his return.

13. Prosecution Witness, Tr 2367-2479

Bay Village patrolman Fred F. Drenkhan[14] testified that he and his partner had been on duty the night of the murder and that they had passed Sheppard's house five or six times that night and saw or noted nothing unusual. That at about 2 A.M. July 4th he conversed with his partner that there was a very high wind from the north and that the lake was very rough. The significance of the latter being that if the lake was rough as described by several witnesses it would cover the beach that had existed in front of the Sheppard house. Officer Drenkhan described how Mayor Houk had phoned the police at 5:57 A.M. and that after his arrival at Sheppard's house he was proceeding upstairs when he noticed Sheppard's *corduroy jacket neatly folded at the foot of the day bed where Sheppard had been sleeping.* Upstairs he noted that there was a phone directly beside Marilyn's bed and that *all physical evidence in the bedroom showed that there had not been a struggle in the room.* (There was a distance of three feet between Marilyn's bed and the blood spattered wall, the area where Sheppard claimed he fought, yet the blood was not smeared in the slightest). Further Officer Drenkhan testified that after an examination of the doors, windows, etc. there was *no evidence of any forceable entry,* that Sheppard's medical bag was turned over yet the *side enclosures had not been opened* and that downstairs three drawers were removed from the desk and *piled neatly one on top* of the other and had not been spilled.

Bay Village Police Chief Eaton[15] related how he examined the entire house for some *evidence of forceable entry and could find none,* and described how he had men search for the missing murder weapon, which included the use of a mine detector and skin divers, among other things, and the

14. Prosecution Witness, Tr 2479-2790
15. Prosecution Witness, Tr 2791-2906

they found absolutely nothing. Chief Eaton told how, after a search of the house, they found a $20 bill, a $10 bill and two $1 bills in a copper mug; a silver dollar, five fifty-cent pieces, two quarters and a nickel in the drawer of a dressing table in the guest room; four $20 bills and two $10 bills in a desk secretary in the downstairs *DESK*; a $20 bill and two twenty-five cent pieces in a chest of drawers in a room next to the east room (the dressing room); as well as $63 and a $1000 check in Sheppard's wallet.

The son of Mayor Houk[16] testified that during the day of July 4th he found the mentioned green bag in the bushes about half way down the embankment leading to the lake dock . . . that the bag contained Sheppard's watch, ring, keychain and keys.

County Coroner Samuel Robert Gerber[17] was on the stand for several days and even though the defense tried under very grueling cross examination to shake some very damaging testimony it could not be done. In addition to testimony of statements of Sheppard related to Dr. Gerber and sworn statements made during the inquest, he testified to many important facts, among which was the introduction into evidence of the pillow slip that had been on Marilyn's bed the night of the murder which showed a bloody imprint on it. This bloody imprint was described by Dr. Gerber as a two bladed instrument, the blades on each side being about three inches long, and two blades together at its widest part, measuring about two and three-quarters inches, . . . that there was a toothlike indentation at the end of each blade. When asked by direct questioning what type of instrument it could have been, Dr. Gerber rendered his opinion that it was an instrument . . . a surgical instrument; however, he did not exclude the possibility that it could have

16. Prosecution Witness, Tr 2907-2955
17. Prosecution Witness, Tr 2956-3549, 4785

been some other type of instrument. Dr. Gerber's examination switched to Marilyn's watch which was found on the den floor downstairs. There was evidence that the watch was *directly beside the tools* which, by Sheppard's statements, must have been removed from the green bag, the bag being kept and last seen by Sheppard in his desk drawer. Testimony revealed that there was blood found on the face of the watch, band and band connection. Dr. Gerber identified an exhibit which was a photograph of Marilyn's left hand and wrist which showed a *blood impression of where the watch had been on her wrist*; thus, the watch was there long enough for the *blood to totally dry and then was removed* and, for some strange reason, deposited on the floor downstairs. Testimony proceeded to describe the *rings that were on the fingers of Marilyn* when she was first observed by Dr. Gerber. Dr. Gerber set the time of death at between 3 and 4 A.M. which compared with the estimated time set by brother Richard. The Coroner stated that he observed throughout the house *what he thought to be a trail of blood* extending from the murder room, down the stairs, through the house and into the basement, thus he called in his Senior Technologist to check all spots.

Cleveland Detective Robert Schottke[18] followed Dr. Gerber to the stand and much of his testimony consisted of a description of the murder scene at the time he and his partner arrived sometime after 8:30 A.M. July 4th. There was a full reiteration of the many conversations he had had with Sheppard and the many pieces of evidence that he was able to gather.

Dr. Lester T. Hoverster[19] was a friend of Sheppard and Marilyn for some number of years and had been their

18. Prosecution Witness, Tr 3550-3766
19. Prosecution Witness, Tr 3767-3823

house guest for a few days prior to July 3rd when he left to visit another friend in Ohio. Dr. Hoversten testified that he had had several conversations with Sheppard from the year 1950 up to the time of the murder concerning the Sheppard's marital situation, the first being during the year 1950 when they all lived in California and Marilyn had traveled to Ohio for a vacation. During this conversation Sheppard presented to Dr. Hoversten a *letter he* (Sheppard) had written to Marilyn and intended to send to her wherein Sheppard described how he felt about their marriage and *that he wanted to consider the possibility of a divorce.* At this time Dr. Hoversten was asked what his advice would be on the matter and he suggested Sheppard not send the letter but to wait *until Sheppard could speak to her* in person. Dr. Hoversten said that a short time after this conversation Sheppard again came to him and that he *had had a call from his father concerning the divorce* situation and that apparently *father* talked him out of it at that time. The last conversation Dr. Hoversten had with Sheppard regarding his domestic problems was in the Spring of 1953 when it came up again about the *possibility of divorce* and Sheppard was asked if he had *talked to his parents* and he stated either that he had or he intended to. Dr. Hoversten testified about his visit with Shep[illegible]rd at the hospital shortly after the murder. Testimony revealed that he was in Sheppard's room when *brother Stephen* entered and *became quite upset to find a visitor,* whereupon the doctor was asked how he got in and was *told to leave,* however, before leaving the hospital Stephen approched him and they both *re-entered* Sheppard's room. After their return Dr. Hoversten was asked whether Stephen said anything to Sheppard and the doctor replied,

"Yes, I remember I was sitting on the left hand side of the bed, and Steve sat near the foot of the

bed. As I recall, Dr. Steve addressed Dr. Sam and said in words to this effect 'you should review in your mind several times a day the sequence of events as they happened so that you will have your stories straight when questioned' and then he gave as an example, 'you were upstairs, you went downstairs, and from here to there' and so forth.".

Following Dr. Hoversten Deputy Sheriff Carl Rossbach[20] testified, his testimony herein previously mentioned. Following was a village fireman[21] and policeman[22] who were at the scene of the crime early the morning of the 4th. Also there was testimony by an employee[23] of the Coroner's office which related *that three rings were taken from the fingers of the murdered Marilyn.*

Mrs. Elnora Helms,[24] called by the State, related how she had done housework once a week for the Sheppards since February of 1952. She testified that in the company of the authorities she inspected the house and particularly Marilyn's bedroom and *could find nothing missing.* Mrs. Helm stated that the Shepards had always occupied a bedroom in the house containing a double bed until about two weeks after their return from California in March, *at which time they moved to the murder room which contained twin beds.*

Cleveland Detective Michael J. Grabowski,[25] a member of the police fingerprint unit, related how the *house was dusted for fingerprints.* He testified he dusted the downstairs areas that had allegedly been disturbed by the "burglar". He examined the overturned doctor's bag in

20. Prosecution Witness, Tr 3824-3921
22. Prosecution Witness, Tr. 3953-3976
21. Prosecution Witness, Tr 3931-3952
23. Prosecution Witness, Tr 3922-3930
24. Prosecution Witness, Tr 3977-4004
25. Prosecution Witness, Tr 4005-4084

the hallway, the doors, windows, furniture of the living room and Sheppard's den, the surfaces of the front and sides of the desk, front of the drawers of the living room desk, front and back of the drop-leaf table, and some of the articles that were on top of the desk, two pictures, and a glass container full of pennies. Grabowski went on to state that he also dusted some letters that he picked up from the floor which he thought might contain some fingerprints. As a result of this Grabowski found *NO FINGERPRINTS WHATSOEVER DOWNSTAIRS,* but he did find some peculiar lines on the items he examined. To him it seemed as though someone had wiped away all prints with rough material—a towel, perhaps, or something resembling sandpaper. Officer Grabowski related how he took photographs and dusted the windows for fingerprints in the murder room *and found none.* However, he did find fingerprints of the occupants of the other rooms upstairs. He found that the alleged "burglar" had not ransacked the upstairs rooms and that the fingerprint powder where used upstairs, turned up none of the peculiar wipe-off lines. Officer Grabowski stated he found *ONE latent print in the murder room,* it being found on the headboard of Marilyn's bed. He stated that he lifted this print and after comparisons found that it was the left thumbprint of Sheppard.

The State produced a Bay Village housewife by the name of Mrs. Doris Bender[26] who lived within one-quarter of a mile of the Sheppards. Mrs. Bender testified that she and her husband were returning home and passed the Sheppard house at approximately 2:15 the morning of July 4th. She continued, and could not be prodded into changing any detail of her statement under vigorous cross examination, that there were *LIGHTS BURNING in an upstairs room and DOWNSTAIRS in the eastern section*

26. Prosecution Witness, Tr 4172-4195

of the Sheppard house. The significance of this testimony is that Sheppard in *ALL of his various accounts* of the events of the murder had stated that *at no time did he ever turn a light on,* and that *all of his "dashing" around was done in total darkness* . . . further that he was asleep until *AFTER* Marilyn had been beaten, yet by the testimony of Mrs. Bender, *there were lights burning on BOTH floors of the house* just prior to the unrefuted established time of death, between 3 and 4 A.M.

The State called witnesses[27] to show that there were three teen-aged boys along the beach some distance down from Sheppard's about 1 A.M. July 4th, and they saw nothing unusual in the area.

A fisherman[28] testified that he was on a pier near Sheppards until 1:30 A.M. The testimony was that he saw nothing unusual in the area but that the *weather got so bad by 1:30 A.M.* that he *had to stop fishing.* He said the wind was coming in from the *northwest* and the *waves must have been coming up 30 to 40 feet on the beach.*

Officer Henry E. Dombrowski[29] of the police scientific identification unit testified that he *located spots of blood throughout the house.* He described how he tested the various blood drippings and found that there was a *positive reaction for human blood* various places in the *stairway* between the first and second floor, on the *steps* of the landing on the kitchen stairs and on the basement stairs.

Miss Mary Cowan,[30] senior technologist in the County Coroner's office, was called to the stand by the State regarding her examination of the house and various objects

27. Prosecution Witness, Tr 4202-4211; Prosecution Witness, Tr 4212-4234
28. Prosecution Witness, Tr 4196-4203
29. Prosecution Witness, Tr 4234-4258
30. Prosecution Witness, Tr 4616-4804

offered into evidence. She stated that she *found blood stains* on the front porch in front of the living room door as well as *other places* throughout the house such as on the basement steps. She continued to testify that she examined Sheppard's watch, ring and key chain that were found in the green bag. She stated that after examination *there were no fingerprints on any of the objects* but that there was *CRUSTED BLOOD on the watch* itself and in the *crevices of the wrist band,* as well as *moisture under the crystal.* After a thorough examination of the green bag itself there was *NO blood of any kind to be found on the INSIDE or OUTSIDE of said bag.* Thus, it can be concluded that the blood on the watch was allowed to totally dry before being placed in the bag, and that the person so placing the articles in the bag had no *wet* blood on his hands when so doing. Miss Cowan said that she examined the six by six and one-half inch spot on the left leg of Sheppard's trousers and found that the spot tested *positive* for human blood, although it had been *diluted with lake water.* She noted that the blood stain was twenty inches from the bottom cuff and that the measurement from the floor to the top of the mattress on which Marilyn was murdered, was twenty-four inches.

Dr. Richard Hexter,[31] a medical doctor, had been called by Police Chief Eaton to examine Sheppard at the family hospital. This the doctor did at 3 P.M. July 4th. The reason for this request was to attempt to verify, if possible, *claimed injuries* received by Sheppard during the alleged struggle with the "intruder". Dr. Hexter testified that he found *very slight injuries,* particularly a blackened eye, but that he *could NOT find neck* injuries as described by osteopathic brother, Stephen.

31. Prosecution Witness, Tr 4436-4615

The State called Thomas R. Weigle[32] who was a first cousin of Marilyn and had known Sheppard twelve years. This witness was obviously called to refute the defense claimed allegation that Sheppard was a calm even tempered individual. He described how he and his wife were visiting the Sheppards on a Sunday during the latter part of March, 1952. Mr. Weigle continued that the television was on as he and Sheppard sat in the living room prior to dinner, when little Chip, the son of the Sheppards, playfully slapped Sheppard's arm. With this Sheppard

> ". . . became in a rage, he seemed suddenly to go into a rage, became very red in the face, and landed a number of blows. Chip immediately began screaming and crying, . . Well, he landed repeatedly a number of blows, and at the time he began yelling himself, that is, Sam, and he yelled very loudly, 'Don't do that. Don't hit me again.'"

Mr. Weigle stated that he then stood up and made the statement,

> "For God's sake, Sam, take it easy",

and then left the room. After leaving the room he said,

> ". . . In fact, I could still hear it. I could still hear some blows being landed, and I could hear yelling going on. As I walked in the kitchen I could hear Sam yell and order Chip to go upstairs without any supper.".

The final witness to take the stand for the prosecution was Miss Susan Hayes,[33] then residing in California. She related that she had been employed in the family Bay View Hospital during part of the year 1951 to December, 1952, when she resigned to take other employment in the city of Cleveland. She resumed her employment as a technician at Bay View in August, 1953, resigning again in February,

32. Prosecution Witness, Tr 4816-4829
33. Prosecution Witness, Tr 4030 et seq.

1954, to move to California. The reason this witness was called was to very pointedly show that *Sheppard*, while under oath at the inquest, *had lied* concerning his relations with Miss Hayes. Miss Hayes testified, contrary to Sheppard's sworn testimony and other statements, that their relationship was far beyond that of just being "friends", as Sheppard put it. She related that they had had intimate sexual relations during both of her employment tenures at the hospital, such relations taking place both in Sheppard's automobile and in an apartment above the Sheppard Clinic. Also that she would see Sheppard at least every Friday during the time that she lived in Cleveland between her two employments at the family hospital. She described how they had lived together (using the same bedroom) at a friends residence in Los Angeles during Sheppard's visit there in March, 1954 while Marilyn visited friends in northern California during this time period. She stated that Sheppard *had given her presents,* particularly *a watch and a ring,* and that he had on various occasions *expressed his love for her.* Miss Hayes described how Sheppard expressed his *love* for her in January, 1954, at her home when he gave her the ring. Concerning the question of *divorce between Marilyn and Sheppard,* Miss Hayes said *that she and Sheppard had had conversations about it,* one being in 1953, Miss Hayes stating,

> "Well, I remember him saying that he loved his wife very much, but not so much as a wife. He was thinking of getting a divorce, but he wasn't sure his father would approve.".

On another occasion she related that Sheppard and she were talking and that

> ". . . he said that he had talked—mentioned to his wife something about divorce.".

Miss Hayes testified that after Sheppard's return from California in 1954, they *corresponded by letter,* her letters being sent to the hospital.

Thus, the State of Ohio rested their case against Sheppard.

(III) SUMMARY OF THE DEFENSE

The defense consisted of, as previously mentioned, some thirty-nine witnesses, by far the majority of which were either character witnesses, witnesses as to the alleged injuries of Sheppard, witnesses as to his actions in the family hospital during his confinement after the murder, or a combination of the above. The essence of these witnesses was to either say that he was a nice individual or that there was some claim to his alleged injuries. It is urged by Respondent that these witnesses added nothing material to the defense other than placing Sheppard's character in evidence, thus, there is no necessity to ponder their testimony here. It is obvious that the jury had to decide the guilt or innocence of Sheppard for the crime of *MURDER* and not whether he was liked by his associates.

As to the medical testimony regarding Sheppard's injuries, Respondent urges that this was not a real issue in the case. There seemed to be no doubt that Sheppard did have some injuries, and this fact was really never disputed by the prosecution. The only issue that became important in the case was, not the extent of the injuries, but how they were received. Through the trial of the MURDER the defense attempted to show that such injuries were received by a "struggle" with an alleged "intruder", while the prosecution continually hammered away at the fact that the alleged injuries were received as a result of some frenzied accident after the murder, such as falling down the 57 steps leading to the lake which Sheppard possibly was running down in order that he could dive into the lake in a vain attempt to wash the inevitable tell-tale blood from his clothing and body.

Brother, Dr. Stephen Sheppard[34] was called as the first defense witness. He testified as to Sheppard's tempera-

34. Defense Witness, Tr 5013-5594

ment, his viewing of the body of Marilyn, the murder house and the rushing of Sheppard to the family hospital by the use of Dr. Stephen Sheppard's automobile, not using the available ambulance. There was considerable examination and cross examination regarding the alleged injuries of Shepard. Dr. Stephen Shepard became very rattled at one point during cross examination regarding the injuries and finally admitted that what he had testified to earlier probably was not the truth. He was examined as to his prior statements that Sheppard had a broken neck, and upon cross it became evident that this was merely a statement and probably not the truth. Dr. Stephen Sheppard testified that he had had a discussion with Marilyn on August 10, 1950, concerning the possibility of divorce between she and Sheppard. Also that Dr. Stephen Sheppard had discussed this conversation with Sheppard a short time thereafter.

Brother, Dr. Richard Sheppard[35] testified that he had known of certain difficulties between Marilyn and Sheppard . . . stating that he felt that Marilyn was "a bit jealous of Sam's profession". He stated that Marilyn had discussed with his wife that while Sheppard was in California in 1950 and Marilyn was in Cleveland, he (Sheppard) wrote to her that he had taken a date to a school dance. Also, Dr. Richard Sheppard stated that he knew Sheppard was unhappy when Marilyn purchased a new sink unit and disposal and had them installed when he (Sheppard) was in Boston.

There was an individual called as a defense witness by the name of Leo Stawicki,[36] a steel worker, who testified that he had passed the Sheppard house about 2:15 or 2:30 the morning of July 4th. He stated that he observed, by the lights of his car, a man, as he described, who had a long

35. Defense Witness, Tr 5634-5751
36. Defense Witness, Tr 6022-6061

face and bushy hair. The defense quickly questioned the reliability of this witness when he admitted that he did not know where Sheppard lived when he drove along the street Sheppard lived on and that he had read in the newspaper the advertisement concerning a $10,000 reward for information leading to the arrest and conviction of the murderer of Marilyn Sheppard, the advertisement having been placed in the newspapers by the Sheppard family July 9, 1954. The witness stated that he read this in the paper July 9th and reported the so called bushy haired man to the authorities July 10th.

Bay Village Police Chief Eaton[37] was called to the stand by the defense and among other things testified again to the fact that, in addition to the money in Sheppard's wallet, there had been found in currency in the house the sum of $156.70, which testimony again pointed out to the jury that the alleged "burglar" mentioned by Sheppard must not have been interested in money.

Finally, after weeks of trial and day after day of defense testimony which at no point ever offered to the jury a defense, the only witness who was present at the time of the murder and the only person who could possibly explain to the jury who committed this crime, took the stand—Dr. Samuel H. Sheppard.[38]

Sheppard testified as to many things, attempted to explain away all that obviously hurt, denied much, however, in answer to one particular question there is no doubt that Sheppard spoke the truth,

> "Q. Now, Doctor, in your life have you committed any sins? A. I have succumbed to human frailty, yes, sir.",

and succumb he did.

37. Defense Witness, Tr 6062-6078
38. Defense Witness, Tr 6142-6643

Immediately upon taking the witness stand Sheppard commenced his attack on the witnesses who in the past had been his friends but who had testified as to events which obviously displeased Sheppard. In defense to the very incriminating testimony of Mr. Thomas Weigle concerning Sheppard beating his son Chip, Sheppard stated that all he had done was,

> "I took him across my knee and I gave him a few fairly reasonable licks on his back end."

He made the entire incident sound as if Mr. Weigle obviously was not correct in his testimony, especially when he finished with, "That's the extent of it.".

When Sheppard was examined by his attorney concerning his advice in the faking of a head injury, as testified to by his neighbor, Mrs. Houk, he denied such conversation. Similar responses came from Sheppard when quizzed about his dissatisfaction over Marilyn purchasing a new kitchen sink and dishwasher—he answered that he was not mad, he had just wanted to use the money to purchase a new insurance program, that's all.

Sheppard apparently found it necessary to attempt to explain away the testified to conversation he had had with Mayor Houk shortly after the murder wherein Mayor Houk suggested to Sheppard that if he did this to admit it and they would still be behind him, at which point Sheppard suggested to Houk that he was also a suspect. How did Sheppard explain, simple, he could not remember very well the conversation, but nothing such as Mayor Houk testified to could have been said.

Shepard had to attempt to remove from the minds of the jurors that there had been discussions of divorce and separation and that there had been disagreements between

he and Marilyn. This task he tried to accomplish by saying very simply that they just plain were not true,

> "Will you tell the jury whether there was any talk of divorce between you and Marilyn? No, sir . . . Now, was there any serious disagreement between you and your wife? No, sir . . .".

The examination continued on as to whether Sheppard had ever discussed with Dr. Hoversten that he wanted a divorce from Marilyn and the asking of advice from Dr. Hoversten concerning the sending of a letter he had written to Marilyn—Sheppard denied this. All of this testimony of denials was related to the sworn testimony of Dr. Hoversten, the climax coming when Sheppard stated that actually it was Dr. Hoversten who was having marital problems and that Dr. Hoversten asked him to get a divorce and move in with him (Dr. Hoversten), Sheppard finishing his answer with,

> "Something of that sort. In effect, I took it as misery loving company.".

Sheppard had a more difficult time when he attempted to explain away his extra marital activities. The truth as to the activities with Miss Susan Hayes can be quickly ascertained by recalling Miss Hayes' testimony and the answers given by Sheppard when asked about his sworn testimony given at the Inquest.

> "Q. Did you tell the truth there? A. I did not tell the truth in relation to Miss Hayes.
> Q. Do you know whether or not you deliberately lied at that time? Now you can answer that yes or no. A. I felt that Miss Hayes' reputation justified that answer, sir.".

When questioned about another lady, Sheppard admitted that he met her behind a shopping center, went for a ride and wound up parked in his automobile in Metropolitan

Park. Sheppard admitted kissing with the young lady but attempted to relate how she was the aggressor and not him. He stated that it was actually closer to the truth to say that the young lady kissed him and that he did not kiss her. Sheppard also stated that he and the same young lady went for a walk in the woods for two hours and upon their return to the place of beginning where the young lady's husband and Marilyn were waiting, the young lady received a slap to the face by husband for her two hour "walk". When asked how Marilyn felt about all this, Sheppard told the jury that Marilyn felt that she was too attentive toward me, and she felt that I was not—she felt that I didn't push her away perhaps as much as I should have.

Sheppard was called upon by the defense to explain the trail of blood that authorities found in the house. He testified to three main causes for the appearance of blood in the house, the first being their female dog "Koko", Sheppard stating that she "bled all over the house". The next category was what could be termed "bleeding children", Sheppard stating that Chip had a couple of teeth pulled and spit blood on the floor. He said the neighborhood boys were always coming into the house to have their wounds patched up—the Paine boy had a fish hook in his back, and Larry Houk had a bad cut. The third cause which undoubtedly must have caused the jury to wince, was that Marilyn's carelessness with her personal hygiene may have been responsible for the blood throughout the house.

During Sheppard's testimony the jury heard his last and final version of the murder of Marilyn. This time Sheppard stated,

> "As I went up the stairs and into the room I felt I could visualize a form of some type with a light top. As I tried to go to Marilyn I was intercepted or grappled, as I tried to shake loose or strike, I felt

that I was struck from behind, and my recollection was cut off."

Sheppard testified that he came to on the floor facing the door and hallway alongside his wife's bed, he was then asked what he saw,

"Well, I realized I had been hurt and as I came to some sort of consciousness, I looked at my wife. She was in very bad condition. She had been—she had been badly beaten. I felt that she was gone and I was immediately fearful for Chip. I went into Chip's room and in some way evaluated that he was all right."

In this version Sheppard said he heard a noise downstairs and rushed down and at the start of the alleged chase downstairs he said,

"I visualized a form — a large — relatively large form; the clothing was dark from behind; there was evidence of a good-sized head with a bushy appearance to the top of the head — hair."

Sheppard testified that he followed the form down to the beach where he was knocked out and came to with the waves washing over him. The form was gone. Sheppard then related that he returned to the house and called Mayor Houk. In this version he stated that before the Houks arrived he realized that he had "a very severe pain in the neck".

It is interesting to note, as so aptly pointed out by the Ohio Circuit Court of Appeals that reviewed Sheppard's case on appeal, that during the time Sheppard was under cross-examination he gave evasive answers such as "I can't recall" or "I can't remember" approximately 216 times to questions concerning facts and circumstances that took place in his claimed presence which were material to the issues in the case.

(IV) CONCLUSION

The jury could reach one ultimate fact that was undisputed, Marilyn Sheppard, wife of the defendant, Dr. Samual H. Sheppard, was brutally and unmercifully beaten to death in her bedroom sometime between 3 and 4 A.M. of July 4, 1954. There was no question that Marilyn received some 35 blows to her head which literally crushed her skull.

It was unquestioned that Sheppard wanted the jury to believe that in some fashion the attacker entered the Sheppard home while he lay sleeping downstairs, that the "intruder" proceeded upstairs and for some reason beat Marilyn to death. Further, per Sheppard's claim, he heard her emit some sound, so he charged upstairs where he was rendered unconscious, not being hit by the instrument which was used on the then dead Marilyn. After regaining consciousness he heard a noise downstairs, so he took chase, down the steps, through the front room, across the porch, down the steps to the lake and to the narrow beach. He wanted the jury to believe that he struggled with this person on the beach, was again knocked unconscious and there he lay for some two hours before awakening. Sheppard then proceeded back to the house, looked at his wife and then called the Mayor of the Village to report the murder.

From Sheppard's numerous changed versions of the events occuring that July 4th morning, what help did Sheppard give to substantiate his story? He was not sure what wakened him, but he did dash upstairs where he was knocked out, but he could not be sure if he was knocked out at the top of the stairs or in the bedroom. He could not testify conclusively whether or not he struggled, or if he did, whether or not in the bedroom. Sheppard at times claimed to have seen a form over his wife and other times he could not see in the bedroom. The description of the

person upstairs changed constantly from nothing to a form larger than himself with bushy hair. Never did Sheppard state to the jury whether there was one or more persons in the house or if it was the same person in the bedroom that he chased down to the beach. What Sheppard gave to the jury was that there was a burglar in the house that beat his wife to death and as to details, even though he stated he was present during the entire episode, he could be of no help.

Thus, giving Sheppard his absolute right to the presumption of innocence and attempting to fit all the evidence together to reach the conclusion that there was a burglar in the house who committed the murder, what would a burglar have to have done for the uncontroverted evidence to be consistent with his presence and actions. He had to enter the house through a door, as the evidence showed that there had been no forceable entry and the upstairs windows were locked, and walked past the sleeping Sheppard. The burglar then had to proceed upstairs and enter the sleeping Marilyn's bedroom, entering no other room as there was no evidence of disturbance or fingerprints upstairs.

The burglar then proceeded to beat Marilyn with some instrument, which he must have brought with him as nothing could be found missing from the house which could have dealt such crushing blows. If Marilyn screamed or cried out it probably was before the first blow was struck or within the first blow or two, thus, during Sheppard's "dash" upstairs the burglar had to strike the remainder of the 35 blows. This would mean that the burglar had to strike the killing blows in a matter of seconds, which would be almost impossible.

This burglar would then be standing before Sheppard with weapon in hand and never use it on him, but instead render petitioner unconscious with a fist. If there was a

struggle in the bedroom it had to be within a three foot area with neither the burglar nor Sheppard touching the blood spattered wall, as the blood was not smeared.

If Sheppard were knocked unconscious upstairs the burglar then apparently proceeded to remove Sheppard's watch, key chain and ring; then go downstairs, dripping blood, through the downstairs ,into the kitchen and down the basement. In the meantime the burglar left the murder weapon under the pillow on Marilyn's bed as was evidenced by the dried imprint on the pillow case admitted into evidence.

While downstairs, during the time interval Sheppard was out, the burglar had to proceed to remove three drawers from the desk, remove nothing from them, and pile the drawers neatly one on top of the other. Then he must have found something such as a rough cloth or form of sand paper and thoroughly wiped the disturbed portions of the downstairs clean of all fingerprints, leaving the wiped areas rough, as testified to by the finger print experts. The burglar then had to go back upstairs and after allowing sufficient time for all blood to dry, take the death weapon out from under the pillow and remove Marilyn's watch, leaving valuable rings on her fingers.

The burglar may have at this time removed the jewelry from Sheppard but left undisturbed Sheppard's wallet containing cash and a check, the wallet apparently lying on the floor where the burglar had to be standing. He then had to proceed back downstairs, take the green bag containing Sheppard's motor boat tools from the den desk and place Sheppard's jewelry in the bag. The blood on Sheppard's watch was dry and the burglar by this time must have cleaned up as there was no blood on either the inside or outside of the bag. Also the burglar did not place Marilyn's watch in the bag as it was found on the den floor.

Even though the burglar was obviously rather busy in a very short period of time with his cleaning up and all, he took nothing else from the house including over $200 in cash, the cash being in some of the very places that he wiped clean of fingerprints.

Sometime during the burglar's activities downstairs Sheppard awoke and heard him, so he took chase. The burglar bolted out the doors, amazingly leaving no prints or marks on the doors, and ran for the lake. During this chase down the 57 steps to the lake the burglar had to be carrying the death weapon, as it was never found, and had to throw the green bag containing Sheppard's jewelry in the bushes at a point half way down the steps.

Shepard caught up to the burglar at the lake and a struggle ensued, at which time Sheppard was again knocked out, but aparently not with the death weapon. At this point the burglar and the death weapon disappeared along with Sheppard's white T-shirt.

After the disappearance of the burglar Sheppard lay face down in waves that were lashing up clear to the cliff like retaining wall for some two hours and did not drown. After this Sheppard proceeded back to the house, up to Marilyn's room, back downstairs and called Mayor Houk from the living room telephone although there was a telephone next to Marilyn's bed.

What else did the jury conclude from the evidence? That Sheppard was not the even tempered person that he would lead them to believe, that he had admittedly lied in both sworn and unsworn statements and that he had not lead a life of a faithful husband and father. Also, there was testimony to cast sufficient doubt on Sheppard's story such as his claim that he had turned no lights on during the time in question, yet evidence showed that there were lights on in

the Sheppard house, both upstairs and down, just prior to the established time of death.

The jury also saw many things that Sheppard could not explain away, such as how did the water get under his watch crystal,—why did he try so hard to make his friends who testified to appear as if they plainly or that their interpretations of conversations and events were totally wrong.

Thus, there was but one conclusion that the jury could reach as a result of all evidence adduced during the trial of Sheppard, that being, there was no burglar or intruder in the Sheppard home during the early morning hours of July 4, 1954, that the scene of the Sheppard home was "faked" to appear that a burglary had been committed and that Dr. Sheppard was in the murder room at the time of the murder and that he had a reason and temperment to commit murder. The ultimate conclusion beyond any reasonable doubt being that Dr. Samuel H. Sheppard murdered his wife, Marilyn, by brutally beating her to death with 35 crushing blows to the head.

II. Publicity

The District Court devoted twenty-eight pages of its opinion to the quotation of newspaper articles which it considered "to be [the] most relevant"[39] examples of prejudicial pre-trial publicity[40] and four pages to trial publicity.[41] Since the District Court found that no jury could have been impartial, the trial publicity was therefor only cumulative in denying petitioner due process of law. Consequently, respondent, in the following argument, refers to both pre-trial and trial publicity since the same considerations apply equally to the probable effect tof trial publicity

39. Ra 407a (Bracketed material supplied)
40. Ra 408a-435a
41. Ra 444a-447a

as to pre-trial publicity except that the former is found in a context even less susceptible to any effect the publicity may have had. Believing it unnecessary to "analyze in detail"[42] either the quoted or unquoted exhibits of this publicity,[43] the District Court nevertheless found the nature of the publicity to be such that it "strongly *suggested* and, in fact, urged petitioner's guilt."[44] the "suggestive-of-guilt" nature of this publicity was sufficient for the District Court to have had "no compunction in *finding* that the publicity was so prejudicial to petitioner that the assurances of the jurors must be disregarded. . . ."[45] By analogy with and on the authority of *Rideau v. Louisiana*,[46] the District Court disregarded the voir dire examination of prospective and empaneled jurors as being immaterial to the determination of whether or not the community was prejudiced against petitioner. It found, solely on the basis of newspaper articles which "suggested petitioner's guilt" that the "comunity was so prejudiced against petitioner that a fair trial could not be had."[47] These findings resulted in the holding by Judge Weinman "that the prejudicial *effect* of the ["suggestive-of-guilt"] publicity was so manifest that no jury could have been seated at that particular time in Cleveland which would have been fair and impartial regardless of their assurances or the admonitions and instructions of the trial judge."[48] On the basis of *selected* newspaper articles, the District Judge determined either (1) that the "suggestive-of-guilt" pre-trial publicity was evidence, in and of itself, of a manifestation of widespread, deep, and abiding community prejudice or (2) that the "suggestive-of-

42. Ra 436a
43. Pet. Exs. Vol. I, Vol. II, Vol. III, Vol. IV, Vol. V.
44. Ra 436a (Emphasis Supplied)
45. Ra 442a (Emphasis Supplied)
46. 373 U.S. 723 (1963), Ra 438a-439a
47. Ra 443a
48. Ra 444a

guilt" nature of the publicity raised a conclusive presumption of the existence of such community prejudice—the voir dire record to the contrary notwithstanding. What the District Court found simply boils down to a determination by it that since the nature of *some* of the publicity was suggestive of petitioner's guilt, it follows that the community of approximately 1,500,000 people was so pervasively prejudiced against petitioner that twelve unbiased and impartial jurors could not have been empaneled who would have afforded the petitioner his right to a fair and impartial determination of his guilt or innocence. Respondent is confident this Court will agree that the findings of the District Court were clearly erroneous, that there not only is a complete lack of evidence of this case of *actual* community prejudice, but that the nature of the pre-trial and trial publicity[49] is not, by any reasonable view, of such a character as to warrant a presumption of *community* prejudice against the petitioner. Further, this Court will surely recognize the necessity in this case for an independent review of the voir dire record, and will, in making that review find not the first indication of juror prejudice against Sam Sheppard but will find a record indicating complete fairness and impartiality.

At the outset, respondent wishes to make clear that it does not mean to suggest that there are not times when the very nature of the pre-trial *newspaper* publicity is such that a court may reasonably infer therefrom, without examining the voir dire record, a conclusive presumption of the existence of pervasive community prejudice against an accused which would obviously preclude the empanelling of a constitutionally fair and impartial jury.[50] However, in such a case the determination of the actual nature of the

49. See Pet. Exs. Vol. I, Vol. II, Vol. III, Vol. IV, Vol. V.
50. Cf. *Rideau v. Louisiana*, *supra*, n. 46

publicity is obviously critical and requires a detailed, in depth analysis as a whole, viewed against the background circumstances then existing in the community.

The fundamental and obvious difference between the inherent nature of any newspaper publicity and that of television has special importance in the context of a fair trial issue as is presented by this case. It cannot be denied that television has a far greater probability of impressing upon the mind of the viewer, by the impact of its simultaneous visual and audio projections, strong and lasting opinions. This is not to say that newspaper publicity cannot achieve the same effect. But the very character of newspaper publicity presents problems in determining its probable effect of far greater magnitude than those of television.

The first and most obvious problem is that of determining the prejudicial or non-prejudicial nature of newspaper publicity from the *whole*. To say that any one newspaper article, even unequivocal in its accusation of guilt, cannot but create in the mind of the reader an irretrievable, lasting opinion, is to admit an unjustified and complete lack of faith in the basic honesty, fair play and intelligence of American people and their traditional belief in the presumption of innocence.[51] Newspaper publicity, reaching the reader as it does in bits and pieces of daily editions, is far too complex to characterize its nature on the basis of selected articles. This is especially so where those articles are in themselves indirect and equivocal insinuations, unsupported by any unrefuted evidence. The difficulty in characterizing the sum total of newspaper publicity is greatly compounded when, as here, there are parts highly favorable to the accused as well as unfavorable; when, as here, insinuation, surmise, and conjecture fill every unfavorable and some favorable articles; when, as here, the parts con-

51. Eg. Appendices A, B, C, D.

tain no direct evidence of guilt, no confession, or even unequivocal accusations of guilt; when, as here, the reputation of the accused is not marred by any past record of conviction; when, as here, there is no significant publication of any evidence not offered at trial. Each article has its meaning and each meaning has its effect upon the sum total nature of pre-trial and trial newspaper publicity. When the same article admits of more than one meaning, the problem of determining the nature of a multiplicity of articles capable of more than one meaning reaches the heights of ridiculousness. Of course the problem diminishes rapidly in magnitude the more direct and unequivocal each article or combination thereof becomes and the percentage of unequivocally prejudicial articles to the whole increases.

Respondent naturally recognizes that the nature of the newspaper publicity does not exist in a vacuum and that either in part or as a whole it cannot be divorced from the community environment (or the infinite experiences of the individual) from which, to a large extent, the publicity derives its meaning. But this only adds to the problems of presuming community prejudice solely on the basis of the character of the pre-trial publicity.

In the constitutional context with which we are here concerned, the ultimate factor of deciding importance is not the inherent nature of the publicity but its probable effect on the community from which the jurors are to be selected. *Amici*, petitioner, and the District Court have either become so infatuated with the phrase "inherently prejudicial" as to lose sight of its meaning and purpose or they have failed initially to undertsand its meaning and purpose from the context in which it has been used by this Court. The most notable examples of its (implicit or explicit) use are in the cases of *Tumey v. Ohio*,[52] *In re*

52. 273 U.S. 510 (1927)

Murchison,[53] *Gideon v. Wainwright*,[54] *White v. Maryland*,[55] *Turner v. Louisiana*,[56] *Rideau v. Louisiana*, [57] and *Estes v. Texas*.[58] Each of these cases deals with basically different, specific practices and procedures all of which, in different *ways*, had the same *effect*—they impinged upon and denied an accused the fairness and impartiality which is the basic requirement of due process. *In re Murchison*.[59] Irrespective of the specific evil present in each case, it was the adverse effect upon fairness to the accused with which the Court was concerned—"the probability that prejudice will result. . . ." [60] Implicit in the use of the word "probability" is the elimination of all other *unreasonable possibilities*. By way of illustration: It is possible that the judge in *Tumey* could actually have been so honest and immune to the temptation provided by his direct pecuniary interest in the outcome of the case before him that it would not have affected his decision, but it is unreasonable to attribute to judges generally, as fallible human beings, the absence of any temptation, because of *direct* pecuniary interest, not to give the accused the benefit of reasonable doubt or the presumption of innocence. It is possible that Gideon could have been afforded a constitutionally fair trial without the assistance of counsel, but it is unreasonable to say that a layman has the knowledge and ability to take full advantage of all the protections the law offers and the constitution guarantees. It is possible to say that the three jurors who saw Rideau's televised confession could disregard it entirely, but it is unreasonable, without impuning their honesty and integrity in the slightest, to expect them to completely erase such a spectacle from their minds.

53. 349 U.S. 133 (1955)
54. 372 U.S. 335 (1963)
55. 373 U.S. 59 (1963)
56. 379 U.S. 466 (1965)
57. 373 U.S. 723 (1963)
58. 381 U.S. 532 (1965)
59. *Supra*, n. 53
60. *Estes v. Texas, supra*, 543

"Our system of law has always endeavored to prevent even the *probability* of *un*fairness."[61] but "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a *probability* that prejudice will result that it is deemed inherently lacking in due process."[62] It is apparent that "inherently prejudicial" simply means that the *probable*, not possible, *effect* of the specific evil involved is unfair to the accused in a constitutional sense. In the context of this case we are obviously not concerned with a state procedure or practice which is itself "inherently" prejudicial to the the accused, but only a state procedure whose *use* in certain circumstances *denies* to the accused a fair trial. We are faced, however, with the issue of the probable effect of newspaper publicity on the impartiality of the jurors. Respondent believes that the District Court failed to fully understand the real question in this case and consequently arrived at a clearly erroneous decision. Certainly the publicity attendant upon petitioner's trial is an obvious example of the fourth estate's failure to willingly assume the concomitant responsibilities of the right to freedom of the press. Neither is it an example of a pursuit of excellence in journalism. But no matter how justified our depications of the newspaper publicity in this case, we are not here concerned with the right to freedom of the press or an assessment of its literary capabilities. What we are concerned with, however, is the *probable effect* of *this* newspaper publicity as a whole on the jurors who found petitioner guilty of murder in the second degree.

It is significant in considering this issue to note that with very few exceptions, the publicity which *amici*,

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61. *In re Murchison, supra*, 136
62. *Estes v. Texas, supra* 543
63 *Amici*, n. 12 & 13, p. 6; n. 14, 15, 16, p. 7

petitioner,[64] and the District Court [65] cite as the worst of it apeared in JULY,[66] over two months before petitioner's trial. A fair characterization of this *selected* publicity is that it was designed to spur on the investigation into the Sheppard murder and was highly critical of petitioner's refusal to submit to a lie detector test and intensive interrogation which criticism insinuated that the press held a strong suspicion that petitioner was guilty because of this refusal. In order to say this July publicity was inherently prejudicial we must consider the probable effect on those who read it. The only indication we have of the reader reaction to this publicity is contained in the "letters to the editor" appearing in JULY and found in appendices A, B, C, and D of this brief and throughout Petitioner's Exhibit, Volume I, July 1954. They not only stand as eloquent justification for faith in the basic honest, intelligence, and sense of fair play of American citizens, but clearly indicate that the probable effect of the worst publicity in this case was to create strong and vociferous criticisms of the press and a reaffirmation of the belief in the presumption of innocence. This is but one example of the probable effect of the publicity which *amici*, petitioner, and the District Court erroneously label as inherently prejudicial. Respondent is not so naive as to say that some of the publicity produced in July 1954 was *designed* to inspire objectivity, but the fact remains that at least some people reacted against it with the objectivity our system of justice has always demanded.

It cannot be denied that the "types" of publicity listed by *amici*[67] may, when they exist (they do not in this case) in other circumstances, create the possibility of community

64. Rs. 101-132
65. Ra 408a-435a
66. Pet. Ex. Vol. I.
67. *Amici*, p. 6-7, 10-11

prejudice against an accused. If "the chief function of our judicial machinery is to ascertain the truth," [68] the search is not aided by removing selected examples of newspaper publicity from the context in which they are found to exist. In this respect, the mood or special prejudices of the community, the viciousness and inflamatory nature of the crime, and the size of the community are relevant and important factors. The significant difficulty in reaching a conclusion of what is the probable effect of newspaper publicity on a community, however, is not so much in the determination of community attitudes or moods, but in weighing the probable effect of one article or combination of articles against those moods and attitudes. Add to this the realization that the meaning of any written word(s) depends upon the individual reader's experience, intelligence, and prejudices and we find the complexity of the problem of determining probable effect almost overwhelming. Of course, deciding the probable effect of newspaper publicity decreases in complexity with an increase in the number of articles susceptible of only one obvious meaning.

The problems of nature and probable effect exist in presuming community prejudice from television as well as from newspaper publicity. However, the conciseness, immediacy, and near-reality extant in television's simultaneous audio and visual projections is not found in newspaper publicity. The impact of television is more readily discernable and more likely to create lasting impressions than is newspaper publicity. People do not necessarily believe all they read as readily as what they see. Further, a person's character and intelligence play a far more important role in the creation of an opinion derived from newspaper publicity than in the creation of an opinion derived from viewing television. The newspaper does not furnish the reader

68. *Estes v. Texas*, 381 U.S. 532, (1965)

an opportunity to evaluate first hand the credibility and sincerity of the source by observing the author's demeanor at the same time the information is presented as does the viewer of television. Newspaper publicity injects more opportunity for the article to create a wider divergence of opinions. Consequently, the justifications for a presumption of community prejudice resulting from television are not readily applicable to newspaper publicity.

Respondent respectfully suggests to this Court that a conclusive presumption of community prejudice against an accused inherent in the nature of *newspaper* publicity is justified *only* where the probable effect would be that no reasonable man, possessed of the honesty, integrity, intelligence, and sense of responsibility and fair play we normally accord to jurors, could help but come to a conclusion from a reading of the publicity that the accused was guilty of the crime charged against him. Further, respondent suggests that, due to the magnitude and complexity of problems surrounding the determination of community prejudice from newspaper publicity and the fact that its effect is likely to be more individualized than that of television, the best initial method of determining the existence or absence of actual community and/or juror prejudice in a highly newspaper-publicized trial is still an independent review of the voir dire record. The voir dire presents the most accurate opportunity for a view of the *effect* of publicity upon a cross-section of the community. But more important, it is the *effect* of publicity on the *jurors* with which we are ultimately concerned. Although it is important that the appearance of justice be maintained, due process of law *in fact* has been in the past and should be in the future our ultimate goal, guided by the realization that to a great degree each case must be decided on its own special facts. The facts of this case do not warrant a pre-

sumption of community prejudice inherent in the nature of the pre-trial publicity nor do they justify a finding of actual juror prejudice against the petitioner. Since the District Court disregarded the voir dire record and found from the publicity alone a denial of petitioner's constitutional right to a fair trial, respondent will argue beginning from the same place—the inherent nature of the pre-trial publicity. The following will but emphasize the necessity for an independent examination of the voir dire record.

A—Probable Effect of Pre-Trial Publicity

If, as the District Court has done, we are to presume community prejudice from the nature of the pre-trial newspaper publicity without a showing of any nexus between that publicity and a fatal infection of the trial with prejudice, respondent contends the nature of the newspaper publicity must be determined from the totality of circumstances then existing in Cleveland and the totality of the publicity. The necessity for a detailed analysis of the pre-trial publicity in particular is especially compelling when, as here, there does not exist any direct evidence of actual community prejudice and we must find sufficient community prejudice to warrant disregarding an independent examination of the voir dire as immaterial. Respondent emphasizes here that the Court of Apeals did make such an analysis[69] of the pre-trial publicity and gave what this Court will find to be an extremely fair, impartial, and factual summary of it character.[70] Further, the Court of Appeals was unanimous in its decision of the issue of pre-trial publicity.[71]

Petitioner has not offered any unequivocal, direct evidence of *community* prejudice or any newspaper publicity which was an unequivocal, direct assertion of petitioner's

69. *Sheppard v. Maxwell*, 346 F. 2d, 707, 712 (1965)
70. *Id*, 715-716
71. *Id*, 755

guilt. An examination of those *selected* articles quoted by the District Judge and which serve as the basis for the briefs of petitioner and *amici*, indicates that they *could* convey to the reader a *suggestion* of petitioner's guilt. Respondent maintains that a fair view of those articles is that they could also convey the *insinuation* that there was a belief by *some* of the press and *some* of the prosecuting officials in the guilt of Sam Sheppard. However, there was no direct, unequivocal statement that either the press or prosecuting officials actually believed Sam Sheppard was in fact guilty. Contrary to what petitioner and the District Court would have us believe, the publicity was not all unfavorable to Sam Sheppard [72] and certainly did not go so far even to assert that he was guilty.

Relevant to a finding that the probable effect of pre-trial publicity was to create a lasting opinion of guilt in the minds of the jurors, is the existence or absence of direct evidence of guilt published in the newspapers but not offered or inadmissible at trial. Although *amici* asserts that this case is "replete" [73] with such evidence, an examination of those newspaper articles cited by *amici* as examples thereof [74] will show this assertion to be completely erroneous and misleading. Further, it is necessary to keep in mind that it is not *any* opinion a juror may have which due process condemns, but only an opinion which will "necessarily raise the presumption of partially." [75] or an opinion the strength of which would require some evidence of innocence to overcome. The caveat of Mr. Justice Clark writing for a unanimous Court in *Irvin v. Dowd* is especially appropriate in this context.

72. See Pet. Exs. Vol. I, Vol. II, Vol. III, Vol. IV, Vol. V.
73. *Amici*, p. 19
74. *Amici*, n. 13, p. 6; n 14, p. 7.
75. *Reynolds v. United States*, 98 U.S. 145, 156 (1879)

"To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. Illinois, 123 U.S. 131, 31 L. ed. 80, 8 S. Ct. 21, 22; Holt v. United States, 218 U.S. 245, 54 L. ed. 1021, 31 S. Ct. 2, 20 Ann. Cas. 1138; Reynolds v. United States (US) supra." [76]

Publication of prosecution evidence not offered or inadmissible at trial is governed by considerations somewhat different than other kinds of publicity when we are trying to determine the probability of unfairness to the accused from newspaper publicity. The importance of whether or not it is direct or equivocal evidence of guilt is obvious. The source of the publicized evidence is also relevant because it often lends credence to the truth of the information published. Whether or not there was also published rebutting evidence and whether or not the unfavorable evidence was admitted at trial is important. In conjunction with this latter consideration it should be remembered that although we are engaged in the effort of determining the probability of fixed juror opinions, the very purpose of requiring impartial jurors is to afford an accused a fair and impartial determination of his guilt or innocence. If evidence of guilt is actually introduced without objection at trial where the protections of the courtroom are available, its publication prior to trial obviously has far less significance in creating the unfairness with which we are concerned. (Of course, confessions cannot be properly placed in the category of evidence we discuss here because the publication of confessions takes the *whole* trial outside the courtroom) Not-

76. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)

withstanding *amici's* assertion that the publicity in this case is "replete" with evidence of guilt not offered at trial or inadmissible if offered, an examination of those articles cited in support of this assertion will show it to be completely erroneous as a basis for presuming inherent prejudice.

Under amici's heading: "Damaging publicity describing prosecution evidence which varies materially from that introduced at trial by the prosecution."[77] (A category previously described as "Publicity relating to testimony of witnesses not offered at trial by the prosecution."[78] Examples of this category are exactly the same as those under the present heading.) there are listed the following examples thereof:

> 1. An article headlined "'Bare-Faced Liar,' Kerr Says of Sam."[79] which referred to petitioner's sworn testimony.

An examination of this article will reveal that Captain Kerr, head of Cleveland's homocide unit, was in fact reported to have called petitioner a liar in the latter's sworn testimony and that Captain Kerr did not appear as a witness at trial. However, facts not pointed out to this Court are that the article appeared not before trial but on December 11, 1954, almost two months after the trial had begun; that petitioner's sworn testimony to which Captain Kerr referred consisted of statements by petitioner that he had been mistreated while in the custody of the Cleveland police (far removed from testimony directly asserting petitioner's guilt); that there is no evidence to indicate this article was ever seen by the jury; and that at the time of

77. *Amici*, p. 19
78. *Id.* p. 6
79. *Id.* n, 62 p. 19-20, See also Rs 110

its publication the jury had more than sufficient evidence before it to indicate petitioner had been less than truthful.

2. An article headlined "Sam Called a 'Jekyll-Hyde' By Marilyn, Cousin to Testify" [80] containing testimony of a prospective prosecution "bombshell" witness.

The cousin was Thomas Weigle who, contrary to *amici's* assertion did testify at trial and whose testimony was almost verbatim of that appearing in the article except for the fact that he did not testify to hearing Marilyn Sheppard call petitioner a "Jekyll-Hyde" which term, in the context of the publication, referred to petitioner's explosive temper —the very thing to which Weigle testified.[81] This article appeared on November 24, 1954, a month after, not before the trial began and petitioner has offered no evidence to show that the jurors ever saw it. The article is not direct evidence of guilt and there is massive evidence of countervailing effect both in pre-trial and trial publicity and testimony of the defense. *Amici's* statement that this article was induced by law enforcement officials is pure fiction.

3. An article headlined "Painesville Woman's Story Opens New Sheppard Quiz. Says Doctor's Wife Wanted To Get Divorce." [82]

It is true that the "Painesville Woman" never testified at trial and that this article appeared on July 15, 1954 two months before trial. However, Susan Hayes,[83] Nancy Ahern,[84] Lester Hoverstein,[85] Stephen Sheppard,[86] and petitioner[87] himself all testified at trial to either petitioner's

80. *Amici*, p. 20, See also Rs. 109
81. Tr 4816-4829
82. *Amici*, n. 13 p. 6, See also Ra 415a
83. Tr 4830-4859
84. Tr 2128-2158
85. Tr 3767-3823
86. Tr 5013-5594
87. Tr 6142-6643

infidelity to his wife and/or he or his wife's desire for a divorce. The "Painesville Woman" herself gave the information to the press, not the prosecution officials.[88]

4. An article headlined, "But Who Will Speak For Marilyn"[89]

Respondent specifically invites the Court to read this particular article over which the District Court, petitioner, and *amici* have made so much comment because respondent is sure the Court will find it as ridiculous as do we as an example both of publicity induced by prosecution officials (which is unmitigated fiction) and as an example of testimony not offered at trial upon which was found a trial fatally infected with the inherent prejudice of pre-trial publicity. It appeared October 23, 1954, after the start of the trial and is nothing more than an amateurish attempt at descriptive prose which obviously failed to attain the heights of literature sought by the author. It contains no testimony of any kind.

Under amici's heading: "Damaging publicity describing prosecution evidence which would be inadmissible in Court."[90]

After listing eight different references under this category,[90] investigation reveals that *amici* makes reference to the same "inadmisible" evidence in all eight—the fact that petitioner had refused to submit to a lie detector test. (Not the fact that he took one and failed, however.) The fact of petitioner's refusal was publicized repeatedly between July 8 and July 22, 1954, prior to trial. Since petitioner assigns the admission into evidence of this fact as a constitutional error, respondent will defer argument to a

88. Ra 415a
89. *Amici*, n. 13, p. 6, See also Rs 126
90. *Amici*, p. 7, n 66, p. 22

later point in his brief. However, it should be pointed out in connection with the probability of unfairness question here that the fact of refusal to submit to a lie detector test was admitted without initial objection at trial and discussed by petitioner on his direct examination by defense counsel. Further, there was a plethora of countervailing publicity asserting Sam Sheppard's innocence.

Respondent realizes that the foregoing discussion relative to evidence not offered or inadmissible at trial is rather lengthy. However, *amici's* obvious attempt to present a view of this case all out of proportion to the true facts and actual significance thereof, added to the same attempt by petitioner, only makes unnecessarily more confusing a case already complex due to the voluminous record and the fact that it is not printed. Further, it just cannot be said with any justification that the record herein contains any significant or substantial quantity of unequivocal evidence (if "evidence" at all) of guilt whose probable effect would be to create a lasting opinion that Sam Sheppard was guilty.

Volume I and II of newspaper clippings before this court show that in July, August, and September, respectively, the Cleveland newspapers reported a detailed, blow by blow account of the progress of the investigation into the Sheppard murder. At no time has petitioner impuned or attempted to impune the accuracy of those reports. Although some of the articles suggest a belief by some in his guilt, there also appear repeated protestations by Sam Sheppard of his innocence [91] and his desire to assist in solving the crime and finding the killer of his wife Marilyn.[92] In addition, there appear numerous reports of petitioner's own story of what transpired at the time of the murder.[93]

91. Eg. Appendices E, F & I
92. Eg. Appendix I
93. Eg. Appendices E & I

In contrast to the publication of detailed confessions in *Irvin v. Dowd*[94] and *Stroble v. California*[95] the televised confession in *Rideau v. Louisiana*[96] and the report of a confession in *Shepherd v. Florida*[97] the record in this case is singularly significant in the conspicuous absence of any hint, suggestion, or insinuation of a confession having been made by the petitioner herein. In the same volumes, the Court will find repeated newspaper reports of the unwavering belief in petitioner's innocence by his family,[98] friends,[99] counsel,[100] and by the employees of the Bay View Hospital where petitioner was a member of the Staff.[101] Of special note is the reported belief of Susan Hayes that she did not believe Sam Sheppard guilty and that she felt sorry for him.[102]

Although petitioner's refusal to submit to a lie detector test, truth serum injections, and "grilling" by the police were duly headlined, his reasons for not doing so were also fully explained in the same and other articles.[103] Petitioner gave an "exclusive interview"[104] to one newspaper and issued a prepared statement[105] to all of them in both of which he proclaimed his innocence, decried his treatment by the police, and set forth his own story and theory of the events which took place at the time of the murder. The newspapers also reported Sam Sheppard as being willing to talk to the police and that he would have talked more

94. 366 U.S. 717 (1961)
95. 343 U.S. 181 (1952)
96. 373 U.S. 723 (1963)
97. 341 U.S. 50 (1951)
98. Eg. Appendix H
99. Eg. Appendix G
100. Eg. Appendix H
101. Eg. Appendix G
102. Appendix G
103. Eg. Appendices B, C, D.
104. Eg. Appendix E
105. Eg. Appendix I

than he did had his attorney not restrained him from doing so.[106]

Volume III of the newspaper clippings is significant in that the newspaper articles contained therein are almost entirely devoted to actual quotations from the record of the voir dire examinations of prospective jurors—an exercise of the jealously guarded right of a free press to report what transpires as a matter of record in the courtroom. *Bridges v. California*,[107] *Pennekamp v. Florida*,[108] *Estes v. Texas*.[109] The remainder of the October, 1954 scrapbook is replete with sympathy evoking articles concerning the entire Sheppard family, their unfailing loyalty to Sam, and their unswerving belief in his innocence despite the hardships and inconveniences imposed on them by the impending trial. Other articles report the expression of surprise and disbelief of numerous people that Sam Sheppard was the defendant in a murder trial.[110]

In contrast to *Irvin v. Dowd*,[111] wherein actual community and juror prejudice was found to exist, the publicity in this case *did not* contain any reports attributing to Sam Sheppard the commission of juvenile crimes, convictions of arson or burglary, convictions by a military courts-martial, or the commission of parole violations. There is nothing in the newspaper publicity in this case to indicate that petitioner's character prior to the murder was anything but exemplary, except for the reports of his marital infidelity. Respondent does not believe that in this day and age, reports of extramarital relations, admitted by the petitioner, could have been so shocking to the sensibilities of the community so as to cause it to thirst after blind and unintelligent revenge

106. Eg. Appendix F
107. 314 U.S. 252 (1941)
108. 328 U.S. 331 (1946)
109. 381 U.S. 532 (1965)
110. Eg. Appendix G
111. *Supra* @ n. 94

against Sam Sheppard, especially where, in all other respects, his personal and public life appeared to be without fault.[112]

Although petitioner, *amici*, and the District Court seek to give the impression that the nature of the pre-trial publicity as a whole and standing alone was so inherently prejudicial to Sam Sheppard that it raised a conclusive presumption of community prejudice, respondent is confident this Court will find as clearly erroneous such a characterization, as did the Court of Appeals. On the contrary, the only reasonable and substantial inference which could be drawn from reading the pre-trial publicity *at the time it was published* is that at its worst this publicity whetted the appetite of the morbidly curious and, through sex and mystery, insinuation and innuendo, at most *invited* speculation, surmise, and conjecture. In a word, the inherent nature of pretrial publicity in this case could only be described as equivocal and the only reasonable inference to be drawn from its nature is that no unequivocal and reasonable inference of petitioner's guilt could be formed. Unlike the 150,000 people of tiny Calcasieu Parish,[113] the 1,500,000 residents of Cuyahoga County, Ohio did not witness repeatedly *any* spectacle of Sam Sheppard personally confessing in detail to robbery, murder, and kidnapping on a twenty-minute sound film shown three different times on local television.

> ". . . The publicity involved in the present case was not of a nature calculated to inspire confidence in the objectivity and good taste of the public news media. But neither was it of a nature calculated to create lasting opinions. (if it ever created any prejudicial opinions at all) as to Dr. Sheppard's guilt. Surmise, conjecture, and accusation were substituted for confession, criminal record, or direct evidence. We are not

112. Eg. Appendix D
113. *Rideau v. Louisiana, supra*

prepared now to hold that American citizens have so far forgotten their traditional heritage of 'fair play' that such shabby reporting would irretrievably infect the minds of an entire metropolitan community. Our jury system cannot long survive if it is now proper to *presume* that jurors, selected with the care taken in this case, are without the intelligence, courage and integrity necessary to their obedience to the law's command that they ignore the kind of publicity here involved."[114]

B. Actual Effect of Pre-Trial Publicity

That the nature of the pre-trial publicity herein was inherently prejudicial to the petitioner is, respondent maintains, a clearly erroneous finding by the District Court. However, even on the bases of this erroneous finding, it is impossible for respondent to understand by what logic or intellectual powers the District Court deduces from the inherent nature of the publicity a conclusion that the "prejudicial *effect* of the newspaper publicity was so manifest,"[115] especially without an examination of the voir dire and in the absence of any evidence of that manifestation. The authority of *Rideau v. Louisiana*,[116] upon which the District Court relied heavily, does not support the use of such gratuitous assumptions. In *Rideau* this Court certainly did not go so far as to presume to find any readily apparent effect upon the community from what it considered to be inherently prejudicial pre-trial publicity. Obviously *Rideau* goes no further than to stand for the proposition that in the circumstances of that case it was unreasonable to expect fallible men to completely disregard the inescapable impression of *seeing* an accused personally confess in detail to robbery, kidnapping, and murder outside the courtroom. The District Court goes much too far even with its own erroneous characterization of the publicity.

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114. *Sheppard v. Maxwell*, 346 F. 2d, 707, 720 (6th Cir. 1965)
115. Ra 444a
116. *Rideau v. Louisiana*, *supra*

In contra-distinction to *Irvin v. Dowd*,[117] the Court will not find, as evidence of actual community prejudice, any newspaper articles in the pre-trial publicity of this case which reported that " 'strong feelings, often bitter and angry, rumbled to the surface' "[118] or that " 'the extent to which the multiple murders—three in one family—have aroused feelings throughout the area was *emphasized* Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pre-trial opinions' "[118] or that there existed " ' a pattern of deep and bitter prejudice against the [accused]' "[119] or that " 'impartial jurors are hard to find.' "[119] Of some significance in this respect are the "letters to the editors"[120] found throughout Volumes I, II, and III. Despite the District Court holding that the "prejudicial effect of the newspaper publicity was so manifest", the only direct evidence in the record of *any* effect the *newspaper publicity* may have had at all exists in these "letters to the editors." The "letters" clearly indicate that some of those who wrote letters were critical of the manner in which the investigation was handled and some people believed Sam Sheppard to be guilty, but most were either critical of the press and/or they still believed in the proposition that an accused was innocent until proven guilty beyond a reasonable doubt and Sam Sheppard was entitled to the benefit of that proposition.[120] Like the nature of the publicity, the only evidence of its manifest effect upon the *community* was at best varied and equivocal. By no stretch of the imagination could the community feeling be said to justify the inference of manifest community prejudice against Sam Sheppard. A presumption to the contrary is patently more reasonable. If there are any news-

117. *Irvin v. Dowd, supra*
118. *Irvin v. Dowd, supra*, 726
119. *Irvin v. Dowd, supra*, 727
120. Eg. Appendices A, B, C, & D.

paper articles in this record to indicate any *community* opinion, respondent contends that the only fair and reasonable conclusion which *could* be drawn from them is the inference that there existed no unequivocal pervasive community opinion against Sam Sheppard, but on the contrary there is unequivocal evidence of the existence of sympathy toward and a belief in the innocence of Sam Sheppard.

In the context of *actual* community prejudice, we do not find involved in this case any evidence of an inflamed community such as the mob violence against the accused, his family, and race in *Shepherd v. Florida*[121] or the state-wide concern over sex crimes against children as in *Stroble v. California*.[122] Significant is the absence of any evidence to indicate any special community moods or prejudices which would lend special meaning to the publicity here involved or increase the probability and/or quality of its prejudicial effect, if in fact the publicity had a prejudicial effect. Our system of justice and especially our jury system, based as they are on a justified faith in the American people's integrity and the sincerity of their belief in the presumption of innocence, cannot long survive if it is now proper to presume juror prejudice because of remote possibilities of community prejudice. It is for this reason that it was clearly erroneous for the District Court to disregard the voir dire as immaterial, for our ultimate concern is with the prejudice which a juror, not the community, has against an accused. If our goal is to be due proces of law in fact, the search for truth necessary to achieve that goal is not advanced by unfounded speculation about the probable effect of newspaper publicity.

Traditionally, the voir dire record has been found to be not only the best but also the most readily available source

121. 341 U.S. 50 (1951)
122. 343 U.S. 181 (1952)

of evidence to indicate the existence or absence of both juror and community prejudice. *Darcy v. Handy*,[123] *Irvin v. Dowd, supra*,[124] and *Rideau v. Louisiana, supra*. As Mr. Justice Holmes speaking for a unanimous Court in *Holt v. United States*,[124] cautioned: "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial[s] under the conditions of the present day."[125] It is because the law realizes a system of justice by one's peers presents opportunities for injustice that the voir dire has become a traditional means of preventing that opportunity from becoming a reality.[126] It does not seem to be asking too much that a particularized examination of the voir dire be made especially where, as here, we have neither unequivocal evidence of community or juror prejudice, publicity of such an obviously and pervasively prejudicial nature, or any evidence to show that it infected the trial as to reduce an examination of the voir dire to but a hollow formality.[127] Even the most casual review of the voir dire discloses its lack of support for petitioner's allegations. On the contrary just the opposite becomes obvious.

The state trial judge clearly recognized the importance and purpose of the voir dire when denying the initial motions for a change of venue, he stated:

> ". . . we will proceed . . . in an effort to determine whether or not we can secure a fair and impartial jury. If we are not able to do that, there will be no question in this Court's mind at all but what this case ought to go out of Cuyahoga county whatever may be the effect of that."[128]

123. 351 U.S. 454, 462-463 (1959)
124. Citing *Reynolds v. United States*, 98 U.S. 145 (1879); *Spies v. Illinois*, 123 U.S. 131 (1887); *Holt v. United States*, 218 U.S. 245 (1910).
125. *Holt v. United States, supra*, 251.
126. *Darcy v. Handy, supra*, 462.
127. Eg. *Rideau v. Louisiana, supra*.
128. Tr. 4

Judge Blythin was also intensely aware of what the law deems to be a fair and impartial juror. In his instructions to the panel of prospective jurors, after explaining to them that the presumption of innocence accorded to an accused is to persist until he is proved guilty beyond a reasonable doubt, went on to caution that a finding of guilt or innocence was "to come not from anyone's notions or outside information, but must come [from] the testimony heard from this witness stand . . ."[129] and that "an impartial juror is a juror who will sit here patiently without any passion, prejudice, or feeling and who will carefully listen to all the evidence . . . to the instructions of the Court as to the law, and be guided solely by them . . . in his decision. . . ."[130] In addition to this general instruction the trial judge explained the purpose of the voir dire to each juror individually.

The voir dire lasted nine days and takes up over 1600 pages of the trial record. Those pages exhibit anything but a hollow formality. Respondent finds it extremely improbable, if not impossible, that the instructions of the trial judge would be unavailing in the face of the publicity or that there were unauthorized, prejudicial contacts with the jury as presumed by the District Court and the dissenting judge in the Court of Appeals. The thoroughness[131] and frequency[132] of the judge's instructions and admonitions throughout the voir dire alone could not but impress upon each juror an intense awareness of the necesity for and their duty to keep their own counsel and not to discuss

129. Tr. 31

130. Tr. 32. See also Judge Blythin's definition of an impartial juror as quoted by the Court of Appeals. *Sheppard v. Maxwell*, 346 F.2d 707, 715, n. 4 (6th Cir. 1965)

131. For significant examples of thorough instructions and admonitions on voir dire alone, see Tr. 897, Tr. 1097-1098, Tr. 1427-1428, Tr. 1446-1448, and Tr. 1590-1592.

132. The trial judge never failed to caution and instruct the jury each time they left the courtroom during voir dire in terms similar to the instructions cited in note 131, *supra*, varying only in length depending upon the length of recess or adjournment.

the case with anyone or listen to a discussion of it by others. One cannot help but be impressed by the searching questions and especially by the consistently repeated admonitions, instructions, and explanations given each and every juror seated on the jury. The trial judge, the prosecutor, and the defense counsel each repeatedly sought to impress upon the minds of every juror the serious and awesome responsibility of deciding the fate of a man's life and the necessity for doing so only on the evidence produced at trial.[133] Each juror was subjected to searching and detailed questioning by prosecution and defense and each stated they had not discussed the case prior to voir dire and had expressed no opinion on the guilt or innocence of the petitioner. Each juror repeatedly swore he had NO opinion as to the guilt or innocence of the accused but could unequivocally give him that presumption of innocence which the law requires. In addition, all the jurors swore he or she would be free from all previous outside influences, enter upon their task with open minds, and decide petitioner's guilt or innocence solely upon the evidence adduced at trial. Finally, each and every juror was asked to honestly search his mind and heart for any possible prejudice they might have and all unequivocally affirmed their ability to accord petitioner a fair and impartial trial and their ability to avoid discussing the case with family and friends.[134]

Out of an original panel of 71 prospective jurors called, defense accepted twelve jurors before exhausting the entire

133. Tr. 379

134. Eg. Juror Borke had informed her husband not to discuss the case as soon as she received her notice of jury duty. (Tr. 148) Juror Orenstein also testified as follows:

> "Q. If you are accepted as a juror in this case, will you keep to yourself and not allow anyone to talk to you about it?
> "A. Yes sir, in fact
> "Q. Or not discuss it with anybody?
> "A. May I say that I have already since Monday instructed my family not to question me at all and they have not done so." (Tr. 484)

panel.[135] Out of this single panel of prospective jurors only 14 were excused for cause,[136] many of them because of opinions about the impropriety of capital punishment. Only one member of the jury who deliberated petitioner's case was challenged for cause and not excused by the trial court.[137] However, the defense accepted this jury while still having one peremptory challenge remaining after the last alternate juror had been examined and accepted.[139] Since the defense had not even used all of its peremptory challenges petitioner therefore should not now be heard to complain at this late date.[140] Further, Juror Barrish swore under oath he had no opinion at all and would be fair and impartial. The voir dire further reveals that NOT ONE of the jurors impaneled in this case stated he had an opinion that petitioner was guilty which would take some evidence to overcome.[141] In fact each juror stated they had no opinion

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135. Compare *Irvin v. Dowd, supra*, where 430 jurors were examined.

136. Compare *Irvin v. Dowd, supra*, where 268 or 62% were excused for cause due holding fixed opinions.

137. Juror Barrish, Tr. 51-117, recalled at Tr. 805-811.

138. Juror Mancini, Tr. 1544-1581.

139. The following colloquy took place at the conclusion of Juror Mancini's examination:

"Mr. Garmone: Thank you, that is all, your Honor, at this time.
"The Court: The State has a challenge.
"Mr. Mahon: The State is satisfied with this juror, if your Honor please.
"Mr. Corrigan: We pass the juror. [defense counsel]
"The Court: You pass for cause, and you pass peremptorily?
"Mr. Corrigan: Pass peremptorily.
"The Court: Do I understand that you have no peremptory?
"Mr. Corrigan: We have no peremptory.
"The Court: You have no peremptory?
"Mr. Corrigan: No peremptory." (Tr. 1581)

140. Petitioner claims a due process deprivation (Ra 150a (2), # 9.) in that he was denied a peremptory challenge when alternate juror Hansen was seated on the panel as a replacement. This claim is of course answered by *Spies v. Illinois, supra*, n. 124. However, after concluding examination of juror Hansen petitioner's defense counsel stated: "Mr. Corrigan: We accept this juror." (Tr. 1494)

141. Compare *Irvin v. Dowd, supra*, where ⅔ or 8 out 12 jurors empaneled they had an opinion that petitioner was guilty which would take some evidence to overcome.

at all. This alone indicates that petitioner was not denied due process but on the contrary was afforded more than the law requires. Due process does not require a juror to be without *any* opinion but only that he be able to lay aside his opinions and be able to render a verdict only on what transpires in the courtroom.[142]

In view of the searching inquiry, the extensively repeated instructions and admonitions of the trial judge and counsel for both sides, the apparent satisfaction of the defense with the jury, and especially the sworn declarations of impartiality on the part of each juror, respondent is, as the Court must be, at a complete loss to find or understand any justification for "disregarding the assurances of the jurors." This case presents no unusually compelling circumstances to justify a conclusion that the jurors were so blinded by the publicity so as not to know their own minds and emotions, or that they were so unimpressed with their solemn responsibility as to jeopardize the fate of petitioner's life, or that they were less than honest and sincere during voir dire and later at the trial.

Respondent is fully aware that it has argued publicity in general and pretrial publicity in particular at some length. However, as Mr. Justice Clark in *Estes v. Texas*, observed, speaking of pre-trial publicity: "Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence."[143] But here, petitioner has failed to present any evidence of community prejudice, or evidence that it was so pervasive that jurors could not help but have an opinion of guilt, or evidence that the jurors were ignorant of their own emotions or untrue to their oath, or evidence that any prejudice infected the trial as to deny him the fairness of due process.

142. *Reynolds v. United States, supra*; *Spies v. Illinois, supra*; *Holt v. United States, supra*; *Irvin v. Dowd, supra.*
143. *Estes v. Texas, supra*, 541.

The voir dire dramatically indicates the complete absence of any foundation for presuming that the "suggestive-of-guilt" nature of equivocal publicity insidiously denied him his constitutionally guaranteed rights. It is evidence that he was in fact afforded more than the Constitution of the United States requires. Paraphrasing the Court in *Darcy v. Handy*,[144] while this Court stands ready to correct violations of constitutional rights, it also realizes that if the mere opportunity for prejudice is to raise a presumption of unfairness, the jury system will not long last. Therefore, "It is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."[145] The propriety of this requirement, in the circumstances of this case, cannot be doubted. The presumptions of constitutionality and juror impartiality are not unfounded and purposeless fictions of the law. That they require the petitioner to show some identifiable prejudice to be entitled to the relief sought here has long been the well-founded position of this Court.[146] Petitioner draws no support for his position that he be excused from sustaining his burden of proof from *Rideau v. Louisiana*, *supra* or *Turner v. Louisiana*, *supra*, irrespective of the fact that the nature of the publicity here comes nowhere near that found in *Rideau*. That contention is clearly answered by *Estes v. Texas*, *supra*. "It is true that in *most* cases involving claims of due process deprivations we require a showing of identi-

144. *Darcy v. Handy*, *supra*, 462.

145. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 281 (1942).

146. *Reynolds v. United States*, *supra*; *Spies v. Illinois*, *supra*; *Holt v. United States*, *supra*; *Adams v. United States ex rel. McCann*, *supra*; *Brown v. Allen*, 344 U.S. 443 (1953); *Darcy v. Handy*, *supra*; *Stroble v. California*, 343 U.S. 181 (1952); *Irvin v. Dowd*, *supra*; *Beck v. Washington*, 369 U.S. 541 (1962); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, *supra*.

fiable prejudice to the accused."[147] That this Court has "departed from the approach it *charted* in *Stroble* . . . and *Irvin*"[148] cannot be read in the context in which the statement appears to stand for the proposition that *Stroble* and *Irvin* are no longer pertinent. *Estes* is but a recognition that there are times when the probability of prejudice is so manifest that an inflexible application of the rule in *Stroble* and *Irvin* is to disregard the obvious, substitute form for substance, and require an accused to perform the impossible task of proving the insidiousness of a specific practice or procedure.[149] All the cases discussed in *Estes* at page 543 are but other examples of the unreasonableness of disregarding reality by an inflexible application of the requirement that an accused show the existence of some identifiable prejudice despite the insidiousnes and obviously prejudicial nature of the practice. "Nevertheless, *at times* a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."[150]

The publicity in this case was not of an inherently prejudicial nature and without more, it cannot be reasonably asserted that it presented such a probability that prejudice would result to hold the denial of a change of venue and the denial of a continuance constituted an inherently prejudicial state procedure. This is especially so when the person most able to assess the probability of prejudice, was convinced, in the exercise of his own sound discretion, that the jury selected could be and was fair and impartial. The defense failure to use all of its peremptory challenges, to file an affidavit of prejudice against the judge, to request the

147. *Estes v. Texas*, *supra*, 543 (Emphasis Supplied).
148. *Ibid.*
149. "Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." *Ibid.*
150. *Ibid.*

sequestration of the jury or to assign lack of sequestration as error on appeal, and its failure to question jurors as to prejudicial influences both before and after trial at the hearing on a motion for new trial, while not determinative of the issue here, are all significant evidence that the defense concurred with the trial judge in his determination that a fair and impartial jury had been selected.[151] It is against this background that respondent now turns to the actual trial of petitioner to argue that, notwithstanding petitioner's failure to sustain his burden of proof or to show any nexus between the pre-trial publicity and/or proceedings with his trial, he was *not* denied a trial by a fair and impartial jury.

151. Accord: *Darcy v. Handy, supra; Beck v. Washington, supra.*

III. CLAIMED DUE PROCESS DEPRIVATIONS AT TRIAL

A. Fair and Impartial Jury (Trial Publicity)

Petitioner makes no claim that any particular petit juror was biased or partial against him or that any adverse juror opinion was actually present or actually infected his trial. Neither does petitioner make any pretense at attempting to prove actual prejudicial contacts with the jury during trial which would infect his trial with fundamental unfairness. Petitioner argues that the mere existence of "adverse" trial publicity and "alleged" prejudicial contacts with the jurors during deliberations must be held to have presumptively infected the minds of the jurors without even an attempt at showing and without any evidence of any nexus between the mere existence of the publicity and the contacts with jurors and a constitutionally fatal infection of his trial with fundamental unfairness. If we are to presume prejudice from the mere opportunity therefor, we are again, as with the pre-trial publicity, faced with the problem of determining the probable effect upon petitioner's trial posed by the mere existence of the publicity and contacts with the jurors. Notwithstanding petitioner's burden of proving the essential unfairness of his trial, respondent's argument is addressed to the improbability of prejudice to the accused and evidence of a trial by a fair and impartial jury.

In this conection, there are considerations somewhat different from those pertinent to the probable effect of pretrial publicity. Of course, we are concerned with the nature of the publicity itself, its source, and the attendant circumstances of its publication. But concerning publicity produced during the trial we have the additional considerations of whether or not the information contained in the

publicity was admitted as evidence at trial, whether or not there was introduced rebutting evidence, whether or not the same information was received in evidence but from a different source, and whether or not introduction of the information contained in the publicity was with or without objection by the defense. All of these considerations are both relevant and material to find the probable effect of publicity and juror contacts during the trial.

Of course, the above considerations all implicitly assume actual juror contact. In this case an inquiry into probable effect has the additional burden of proceeding first to find justification for probable contact with the jury. In reference to probable contact with the jurors, consideration thereof must proceed upon the realization that the voir dire clearly indicated each jurors' qualifications of impartiality far exceeded the minimum standards this Court has previously established and there is no evidence justifying the presumption that jurors were or are unfaithful to their oath or that they were not sufficiently instructed by the trial court, prosecution and defense. The latter was obviously convinced of the jurors' impartiality and integrity. In short, we must proceed not only with a presumption of juror impartiality and obedience to their oath, but with unrebutted evidence thereof.[152]

"This Court holds that there was such a plethora of prejudicial material contained in the newspapers that no admonition or charge of the court could vitiate the effect of the publicity."[153] Respondent cannot nor does it wish

152. Statements made by jurors after trial indicate the validity of our justifications for presuming juror honesty and intergrity. (Appendices J, K, L, & M) EG. "Mrs. Louise K. Feuchter gave newsmen little information, but pleaded with him to 'put this in your story': 'I'm so greatful to all my friends and relatives who never questioned me about the trial.'" (Appendix J; p. 2, Col. 5.)

153. Ra 450a.

to minimize the volume of publicity in this case.[154] However, respondent cannot agree with the District Court's characterization of the newspaper publicity as a "plethora of *prejudicial* material." Except for those articles set out in full by the District Court, all the headlines quoted by it were, although sensational, merely introductions to verbatim quotations taken from the trial transcript. Except for the notable examples discussed below, a review of the trial publicity reveals nothing more than extensive factual reporting of the evidence given and events occurring at trial.[155] Considering the trial publicity as a whole, nothing is more obvious than the clearly erroneous characterization thereof by the District Judge. The "plethora of prejudicial" publicity actually consists of but isolated instances of what petitioner insists is the most damaging publicity possible. The significance of the insignificant quantity but emphasizes the lack of justification for presuming the jurors even read the articles claimed by petitioner to have fatally infected his trial—unless, of course, we are willing to presume that which petitioner urges. He implicity contends that these jurors were without any conscience and completely disregarded their oaths and the trial court's constant admonitions, not to mention

154. Although greater in quantity and more sensational in nature than can be called conducive to the search for truth respondent here advocates, it should be pointed out to the court that the volume of publicity, although large, is not as great as petitioner would have us believe. The five scrapbooks before the Court (Petitioner's Ex. Vol. 1, Vol. II, Vol. III, Vol. IV, and Vol. V) contain substantially all of the publicity produced in Cuyahoga County before, during and after the trial covering a period from July 4, 1954 through December 31, 1954, of six months. Further, the exhibits represent the publicity not only in Cuyahoga County but out-of-town, out-of-state, and foreign. They represent 180 days worth of newspaper publication by three different Cleveland newspapers, two of which published at least two and usually more editions per day. This is not to minimize the amount published but only points out that the volume of publicity reaching any one person or prospective juror was far less than would appear.

155. Petitioner makes no claim that these newspaper articles are inaccurate.

that such a presumption implies mass perjury. Petitioner's failure to use all his peremptory challenges, his acceptance of the jury, his failure to request their sequestration, and his failure to avail himself of the opportunity of questioning the jurors as to actual contact with the publicity at the hearing on a motion for new trial[156] despite the fact that he subpoenaed three of them, is a significant indication that petitioner did not then consider as a possibility what he now urges this Court to presume without supporting evidence.

Turning to the specific instances of allegedly prejudicial publicity, we are confronted with an article headlined "But Who Will Speak For Marilyn" appearing October 23, 1954 on the front page of the Cleveland Press[157] and described by the District Court as "one of the most prejudicial" in that it "literally screamed for petitioner's conviction."[158] Containing no testimony at all, it was cheap sensationalism attempting to evoke sympathy for the murdered Marilyn Sheppard. While it needs no explanation and certainly deserves no justification, respondent accepts petitioner's invitation to provide mitigation for it even though respondent cannot imagine this article having any other effect than disgust for its writer. What could be more evoking of sympathy for the murder victim than this innocuous article? The grim, revolting, color slides placed before the jury and showing the unbelievable injuries produced by thirty-five crushing blows to the victim's head. Nevertheless, numerous jurors stated after trial they felt sorry for petitioner.[159]

The other "glaring examples"[160] of prejudicial trial publicity are the articles headlined " 'Bare-Faced Liar' Kerr

156. Tr 7033 et seq.
157. Rs 126
158. Ra 436a-437a
159. Appendices J, K, L, & M
160. Ra 444a

Says of Sam" and "Sam Called A 'Jekyll-Hyde By Marilyn, Cousin To Testify" both of which were previously discussed at pages 65-66 of this brief. Respondent respectfully urges the reader to at this time refer back to that discussion. Respondent only adds here that in regard to the "Jekyll-Hyde" article as far as the petitioner's character is concerned, he was present throughout the trial and took the stand in his own behalf. It seems extremely unlikely that this article could have possibly had any significant effect on the jurors since petitioner was available for observation in person, even if it came to the attention of the jurors. As to the "Bare-Faced Liar" article, if it was ever read by the jurors, reports of what the jurors considered during deliberations[161] completely destroys any possibility that the article had a prejudicial effect. Compared with what was introduced at trial, this article becomes significantly insignificant.

The remaining two instances of prejudicial publicity consists of two radio broadcasts. One of these broadcasts was made by Walter Winchell at 9 P.M. on December 5, 1954 reporting the assertions of a girl under arrest in New York for armed robbery that petitioner was the father of her illegitimate child.[162] When questioned, two jurors readily admitted hearing the broadcast, but both stated they would not be influenced by it.[163] The trial judge admonished them to "confine ourselves to this courtroom, if you please" after stating that such "scavenging" had "no place whatever in our thinking or considerations or thoughts in any way, shape, or manner in this case."[164] Since considerable evidence of petitioner's marital infidelity was already before the jury,[165] it again seems unlikely the broadcast could

161. Appendices J, K, L, & M
162. Tr 5427
163. Tr 5430
164. Tr 5430
165. Pros. Wit. Susan Hayes, Tr 4830 & 5013

have had any significant effect on the jurors. The other broadcast was made by Robert Considine at 6:30 P.M. on November 21, 1954 during which he made a comparison between defendant and convicted perjurer Alger Hiss.[166] Although the court refused to interrogate the jurors during the trial, petitioner had ample opportunity to do so at the hearing on his motion for a new trial.[167] Further, there is not the first indication that the jury heard the broadcast. Even so, there was at the time, ample evidence that petitioner had been less than truthful as noted in Part I of this brief.

With the exception of the Winchell Broadcast, none of the above prejudicial publicity has ever been shown to have reached the jury despite the fact that petitioner had ample opportunity to at least determine that the jurors had heard the broadcasts or read the publicity. Further, the probability of their prejudicial effect is extremely remote, if at all possible, when one considers that nothing contained in either newspaper or radio publicity had not been put into evidence at the trial.[168] In view of the searching inquiry made by the jurors, their concern for the presumption of his innocence, the length of their deliberations, and their overall fairness to petitioner exhibited in Appendices J, K, L, & M *infra*, petitioner's claims of due process deprivations are obviously without substance and certainly do not, either singly or in conjunction, present a situation infused with such a probability of unfairnes as to justify a presumption of inherent prejudice.

Petitioner's contentions have even less force when the trial judge, best able to evaluate the probability of preju-

166. Tr 3723
167. Tr 7033
168. Compare *Marshall v. United States*, 360 U.S. 310, (1959) in which inadmissible evidence ***NOT*** presented at trial but which ***DID*** reach the jury was considered no more than reversible error in this Court's exercise of supervisory power over the lower Federal courts.

dice, did not deem the one contact by the jurors with publicity to be prejudicial to the petitioner. The trial judge has a large measure of discretion in ruling on such matters and his determination should not be taken lightly.[169] Neither have all the Ohio courts which have reviewed this case found error therein.

That his trial was fatally infected with a fundamental unfairness is further asserted by petitioner because the jurors after retiring for deliberations on the verdict made unauthorized telephone calls to their families.[170] Petitioner maintains that these unauthorized communications are presumptively prejudicial and denied him his right to a fair trial. The testimony of Bailiff Francis, taken at the hearing on the motion for a new trial, appears as follows:

"Q. Do you know, of your own knowledge, whether there was any telephone communications made out of any of the respective rooms that were occupied by any members of the jury?

"A. Their phones were cut out, Mr. Garmone.

"Q. And were there any telephone calls made from the room that you occupied?

"A. Yes, sir.

"Q. Did you make the calls, or did the jury make the calls?

"A. No. The jury made the calls, and I sat in the chair right alongside the telephone.

* * * * * * * * *

"Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?

* * * * * * * * *

"A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.

"Q. Was there any conversation whatsoever about this case or their deliberations?

"A. Not one word, Mr. Parrino."

169. *Reynolds v. United States, supra; Spies v. Illinois, supra; Holt v. United States, supra.*

170. TR 7083

These telephone calls were assigned as error on appeal but were found by the Ohio Supreme Court to be insufficient cause for reversal.[171] Here again we are not presented with any evidence of actual juror prejudice resulting from these communications despite the fact that petitioner had the opportunity after trial to inquire of the jurors present at the hearing on the motion for a new trial what communication they received. When we are faced with a possibility of juror prejudice resulting from unauthorized communications the matter must to a large extent be left to the discretion of a trial court.[172] Judge Blythin did not find any indication that the prejudicial communications were made to the jurors which would require a new trial.

Again we are faced with the necessity for determining the probability of essential unfairness resulting from this situation. All jurors were properly permitted to associate with their families throughout the trial. It would seem incongruous to presume that a member of the family would choose this particular time to transmit a prejudicial opinion to a juror. Keeping in mind the presumption that jurors remain true to their instructions and realizing that petitioner neglected to show that the jurors did in fact receive prejudicial communications can but lead us to the conclusion that, while possible, the probability of unfairness is too remote to presume a denial of petitioner's constitutional rights.

Petitioner does not draw any support for his position from such cases as *Mattox v. United States*[173] and *Turner v. Louisiana*.[174] *Mattox* involved a direct review of a lower Federal Court trial in the exercise of this court's super-

171. *State v. Sheppard*, 165 Ohio St. 293, 298-299 (1956)
172. See cases cited *supra* note 169.
173. 146 U.S. 140 (1892)
174. 379 U.S. 466 (1965)

visory authority. In addition there was uncontroverted evidence that the jurors in *Mattox* actually came in contact with prejudicial material. *Turner* likewise presented a case wherein the jurors were shown to have had actual contact with prosecution witnesses *outside the courtroom* where they were able to assess the credibility of those witnesses by continuous and intimate association without the protection of courtroom procedures. Both cases were quite inapposite to the situation presented here. The probability of unfairness as in all other claimed constitutional errors is too remote to justify the presumption of constitutional infirmity in petitioner's trial. It should be pointed out once again that there exists evidence in this record that the jurors had instructed the families not to discuss the case with them and that their friends and relatives did not do so.[175]

Before proceeding on to other claimed constitutional violations, respondent wishes to point out that the District Court considered the cumulative effect of the foregoing opportunities for juror prejudice to have been inherently prejudicial to the accused. Respondent does not deny that in some circumstances single defects in an accused's trial may not by themselves rise to constitutional proportions but in their conjunction be a denial of the right for a fair trial. In the present case the most that can be said is that the publicity was not prejudicial in the context in which it was produced and that the combination of these opportunities for prejudice in the absence of some showing of a connection with the jury cannot be deemed to have denied petitioner his constitutional rights.

175. See footnote 134 and footnote 152

B. Fair and Impartial Judge

With the same impunity that petitioner ascribes, failure of the jurors to fulfill their constitutional duty to provide him with a fair and impartial trial, the petitioner urges us to presume that the "prejudice" of the trial judge denied him his right to a fair and impartial trial. The basis of the alleged partially of Judge Blythin consists of statements he was purported to have made prior to the commencement of the trial.[176] The affidavit attributing to Judge Blythin's expressions that he believed Sam Sheppard guilty are unsworn, uncorroborated, and incapable of being denied by the now deceased trial judge. Yet the District Court considered these affidavits as uncontroverted evidence of the fact that such statements were made. Further, the evidence revealed that while the affiant Murray was able to recall the exact words by Judge Blythin he could not recall the three or four other people allegedly present at the time the statements were made. While not strictly speaking uncontroverted, the unsupported statements alleging the prejudicial remarks of the trial judge are not at all consistent with the *sworn* affidavit of Mr. Garmone.[177] Mr. Garmone made clear that Judge Blythin was anxious to afford petitioner a fair trial and that he would most willingly excuse himself from sitting on the court if defense counsel so desired. The trial judge, however, assured defense counsel that he could sit and hear the case without prejudice. Petitioner's trial counsel were obviously quite satisfied in the impartiality of Judge Blythin.[178]

Respondent readily agrees that it is indeed axiomatic that the right to a fair trial includes the right to an im-

176. Ra. 387a & 391a
177. Ra. 383a
178. Ra. 384a

partial judge, but who could be more concerned in securing a fair trial than defense counsel themselves? It would seem that counsel retained by petitioner, who knew personally and were able to observe intimately the trial judge, would not have let such a situation pass but would have availed themselves of the simple remedy of filing an affidavit of prejudice. While the unsworn statements of Kilgallen and Murray would indicate a possible prejudice on the part of Judge Blythin, the affidavit of petitioner's trial counsel unequivocally indicates that Judge Blythin stated he had no fixed anticipatory judgment and that he had no hostile feeling toward the accused.

It should be remembered that the trial judge in this case was not the trier of facts. It fell solely upon the jury to determine the guilt or innocence of the petitioner. Even assuming, arguendo, that Judge Blythin did hold a prejudicial opinion petitioner has pointed to no conduct on the part of the trial judge which indicates he was unfair to Sam Sheppard. Judges are no less human than jurors and it cannot be required, especially in these days, that judges be totally ignorant of the facts and issues involved nor can it be expected that they cannot have formed some opinion as to the merits of the case. But to hold that the mere existence of a prejudiced opinion in the mind of a trial judge would without showing some manifestation thereof in the trial proceeding would be to establish an impossible standard. The trial judge here had no direct pecuniary or personal interest in the outcome of this case. To assert that the forthcoming judicial election would have influenced the judge to deny petitioner his constitutional rights approaches the zenith of cynicism, especially in view of the fact that many felt sorry for petitioner. A review of the trial transcript clearly indicates the sincerity and earnestness with which this judge presided over petitioner's trial.

His patience, with the dialectics and frequent defiance of defendant's counsel is incomparable. His instructions to the jury bespeak his personal awareness of the seriousness of the matter before him and his respect for the law. Petitioner cannot point out with any particularity wherein he was prejudiced in the conduct of his trial even if we assume the trial judge had some opinion. Since we are concerned with actual fairness to the accused, petitioner's claim seems significantly hollow and unfounded. Such claims by petitioner are but further examples of a desperate grab for straw-men on whose backs he may ride to freedom. Again we are asked to speculate upon a matter so serious it involves the reputation of a long-time state trial judge and implicitly impugns the integrity of everyone which the record shows to have been so concerned with affording petitioner more than that fundamental fairness required by the Constitution.

C. Lie Detector Evidence

Pretrial publicity frequently referred to Petitioner's refusal to submit to a lie detector test. Some of this publicity was a direct result of Petitioner's voluntary statements, both sworn and unsworn, oral and written. The fact that the Petitioner had refused a lie test was initially introduced at trial without defense objection. On the contrary, such refusal was freely discussed on direct, cross, redirect and recross examination, testified to the Petitioner himself and alluded to by both prosecution defense counsel and closing arguments. While now claiming introduction of this evidence to be constitutional error, Petitioner, twelve years ago, did not assign its sufficient significance to assign as error on appeal.

Petitioner first made objection to introduction into evidence the fact of his refusal to take a lie detector test

at the introduction of State's Exhibit No. 48, offered into evidence at page 3610 and received at page 3614 of the trial record. This was after the evidence had already been put before the jury without objection during the testimony of Officer Drenkhan. However, State's Exhibit 48 was a voluntary written statement given to the police in the presence of defense attorneys. Further, despite the above objection, Petitioner, when testifying in his own behalf on direct examination, discussed his initial willingness to take a lie detector test.

Whether or not introduction of such evidence (failure to take a lie detector test) is of a constitutional magnitude is questionable. Nevertheless any complaint in this regard petitioner may have had, he clearly waived such a claim by his obvious and deliberate failure to preserve it as error.

IV. OTHER CLAIMS OF DUE PROCESS DEPRIVATIONS

A. Proper Review By The Court of Appeals

Petitioner's claim in this respect is clearly without substance.

The District Court indicated clearly[179] that its decision was based upon a consideration of only part of the twenty-three stipulated issues.[180] Respondent appealed the decision of the District Court basing its argument upon the erroneous finding of facts and conclusions of law made by the District Court in relation to those stipulated issues considered by that Court. Petitioner was obviously apprised of this fact by respondent's brief in the Court of Appeals and admitted the knowledge thereof in his own brief in that Court. Yet, petitioner did not argue the other claimed constitutional violations in his brief before the Court of Appeals, but stated therein that to the extent these additional issues may be entitled to some consideration, we will stand upon the argument addressed to them in the Brief for Petitioner in the District Court.[181]

Respondent wishes to point out that all of the stipulated issues before, but not considered by, the District Court with the exception of stipulated issues numbered 18, 19, and 21[182] were before the District Court on a stipulated set of facts contained in Pre-Trial Order No. 4.[183] Although petitioner had the opportunity,[184] he did not subsequently present any evidence to substantiate the latter three issues and should not now be heard to say that he was deprived of a proper review thereon in the Court below.

179. Ra. 404a & 476a
180. Ra. 398a-401a
181. Ra. 151-237a, 300-352a
182. Ra. 400a
183. Ra. 150a (6)
184. Ra. 150a (16)

A reading of the two briefs submitted by petitioner to the District Court[185] shows clearly that petitioner evidently did not consider stipulated issues 18, 19, and 21 important because, although he would stand upon his argument of them in his briefs to the District Court, those briefs contain no argument addressed thereto.

Although petitioner now feels that he was denied due process of law because he claims the Court of Appeals did not adequately consider these issues, he evidently did not think the total failure of the District Court to consider them at all a sufficient denial of due process of law to even assign such failure to consider them, as error in a cross-appeal. Having failed to do so the petitioner now desires this Court to review on certiorari an alleged error in the Court of Appeals which, when committed in a larger magnitude by the District Court deciding in petitioner's favor, was not even pressed by him in the Court of Appeals. Petitioner was of the opinion, that the Court of Appeals could, if it disagreed with the District Court decision, either remand or decide itself the issues not considered by the District Court. Upon a stipulated set of facts the Court of Appeals considered the stipulated issues not considered by the District Court. The Court of Appeals took this case under consideration after oral argument on the 9th day of October, 1954 and rendered its decision consisting of some 80 pages on the 5th day of May, 1965. In that decision the Court of Appeals stated "... we consider that the case made in the District Court is before us and we have considered and found without merit the other claims of constitutional vice in the judgment convicting Dr. Sheppard."[186] And, as the dissenting

185. Ra. 151a & 300a
186. Rs. 57

judge remarked, "My brothers, . . . have written a careful and scholarly opinion."[187]

For the petitioner to say, after seven months consideration of this case by the Court of Appeals, after that Court stated it *did* consider all the issues, after the petitioner himself did not press consideration of all the issues upon that Court, is for him to unnecessarily impugn the sincerity and conscientiousness of the Court of Appeals. The Court of Appeals did consider all the issues. But after asserting that they did not do so adequately, petitioner cites not that first instance which even hints at substantiating his claim or in what particulars the Court of Appeals denied him a full and fair review, except for the fact that they did not write at length in their opinion concerning the issues not considered by the District Court.

Respondent is sure that the Court will agree that petitioner has failed to present anything in the nature of "special and important reasons" for which the Court will grant certiorari, let alone an error of such magnitude as to constitute a denial of due process.

B. The Other Constitutional Violations

Petitioner claims a denial of counsel at his arraignment was a violation of his constitutional rights, however, the record makes clear that Petitioner was afforded counsel of his own choice from the day of the murder until the present time and he does not point to any particular in which he was prejudiced by the lack of counsel at arraignment.

Petitioner also alleges that he was denied his constitutional right to a fair trial by reason of the seizure of his house by police officials, thereby preventing him from

187. Rs. 92

developing evidence to support his defense. The testimony of Chief Eaton[181] shows that Petitioner was not refused access to his house but only that a police officer accompany him to the house and that control of the *keys* would be retained in the possession of the Bay Village authorities and/or the Cleveland police.

CONCLUSION

> "As proud as we are of the great traditions of our courts and their concern for the rights of those accused of crime, we are aware that like all human institutions they seldom act with perfection. It is not difficult, after ten years of searching analysis and contemplative study and the announcement of some new judicial attitudes, to find some imperfections in the conduct of a trial and to conclude that a judge or any attorney could have done a better job. But stability of the law and a nation's respect for its courts will disappear if, long after the event, their judgment may be set aside because a trial judge's discretion was less than perfectly exercised or because it is thought that the trial plan of defense counsel was not the best that could have been employed. This must be especially true where an accused has enjoyed adequate and full opportunities for appellate review."

Respondent respectfully urges this Court to affirm the decision rendered by the United States Court of Appeals for the Sixth Circuit in this case and to order that Court to forthwith issue its mandate.

Respectfully submitted,

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